TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 604

REGINALD P. RAY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1936.

CERTIORARI GRANTED FEBRUARY 8, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 604

REGINALD P. RAY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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(Illegible) (Inc.), Printers, Washington, D. C., February 10, 1937.

[fol. 1] UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 7th day of July in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the One Hundred and Sixty-first.

Charles Weiser, Clerk. (Seal.)

CRIMINAL DOCKET

Docket ..... Case No. 851

TITLE OF CASE	
THE UNITED STATES vs. J. Crawford Stevens Frederick P. Condit Reginald P. Ray Philip H. Kuss Land Westchester Title & Trust Company	Violation of Using the mails to obtain money & property by means & false representations & conspiracy so to do. U.S. Code Title 18, Sec 338 & 88 Attorney for Defendant:

DATE			PROCEEDINGS	No. of Words	CLERK'S FEES	
					PLAINTIFF	DEFENDANT
APR	29	1935	Filed Indictment.			
MAY	2	1935	J. Crawford Stevens Pleads Not Guilty Bail #3500 granted & PM to give bail			
"	2	1935	Frederick P. Condit " " Bail #3500 granted to PM to give bail			
"	"	"	Reginald P. Ray " " Bail #3500 granted to PM to give bail			
"	"	"	Philip H. Kuss " " Bail #3500 granted to PM to give bail			
"	"	"	Westchester Title & Trust Co " " Ordered			
			entered by the Court - Hulbert J.			
May	7,	1935	Filed notice of appearance as to Frederick P. Condit by Dwight F. McKee.			
"	"	"	Filed notice of appearance for deft. Philip H Kuss by Fogarty & Devlin. Atty.			
"	"	"	" " " " " J. Crawford Stevens by Fogarty & Devlin. Atty.			
"	"	1935	" " " " " Reginald P. Ray, by Lynch, Kahn & Reid. Atty			
"	"	1935	affidavit and order to show cause for an order			
			directing U.S. to serve deft. Reginald P. Ray with a			
			bill of particulars etc. - Motion granted with			
			exception & certain paragraphs denied as to other (See memo endorsed)			

J. Crawford Stevens
Frederick P. Condit
Reginald P. Ray
Philip H. Kuss and
Westchester Title & Trust Company

False representation & Conspiracy
to do do.
U.S. Code Title 18, Sec 338 & 88

Attorney for Defendant:

DATE Month	Day	Year	PROCEEDINGS	No. of Words	CLERK'S FEES Plaintiff	Defendant
APR	29	1935	Filed Indictment.			
MAY	2	1935	J. Crawford Stevens Pleads Not Guilty Bail $3500. ourselves & Pty to give bail			
MAY	2	1935	Frederick Condit Pleads Not Guilty, Bail $3500 fixed to PM to justify			11
			Reginald P Ray Pleads Not Guilty. Bail $3500 fixed to PM to justify			
			Philip H. Kuss Pleads Not Guilty Bail $3500 fixed to PM to give bail			4
			Westchester Title & Trust Co Pleads Not Guilty Ordered			
			entered by the Court. Hulbert J.			
May	7,	1935	Filed notice of appearance of Atty as to Frederick			
			P Condit by Dorgel & McKee.			
"	8	"	Filed notice of Appearance for deft. Philip H. Kuss by Fogarty & Devlin. Atty.			"
"	10	"	" " " " " J. Crawford Stevens by Fogarty & Devlin. Attys.			
June	14	1935	" " " " " Reginald P. Ray, by Lydeck, Cohen and Reed. Atty			
July	10	1935	affidavit and order to show cause for an order			
			directing U.S. to serve deft. Reginald P. Ray with a			
			bill of particulars etc. - Motion granted with			
			respect to certain paragraphs; denied as to other (See memo endorsed)			
			Bondy J.			

Continued on Page 859½ Case No. 8502

8 & 9	1/2		United States vs J. Crawford Stevens et al C 96-881
July	12,	1935	Filed Recognizance J. Crawford Stevens $3500 Continental Cas Co
"	12,	"	" " Reginald P. Ray $3500 Continental Cas. Co.
"	12,	1935	" " Philip H. Kuss $3500 National Surety Corp.
"	12,	"	" " Frederick P. Condit $3500 National Surety Corp.
Aug.	14,	1935	Filed affidavit and notice of motion to reopen motion for particulars. Memo Ent Bondy J. (See Memo)

(Continued on Page 1106)

Docket ..... Case No. 860

Page
Docket 1106

CRIMINAL DOCKET

Case No. 161

TITLE OF CASE	
THE UNITED STATES *vs.* J Crawford Stevens et al	Violation of C96-881 Attorney for Defendant:

DATE Month	Day	Year	PROCEEDINGS	No. of Words	CLERK'S FEES Plaintiff	Defendant
Oct	9,	1935	Filed order granting motion for a bill of particulars, so far as they are now known to the United States, etc. as to defendant Reginald P Ray and Order granting motion for re-arrangement of the above motion and further order that the bill of particulars be modified. Bondy J.			
Feb	24	1936	Filed Stipulation between attorney for the United States and the deft. Frederick O Londit that the motion for Bill of Particulars be and hereby is settled on certain terms and conditions etc			
"	24	"	Filed Bill of Particulars and affidavit of service that the Bill of particulars was served on Lynch, Cahn & Wood, attorneys for deft. Reginald P. Ray.			
"	24	"	Filed additional Bill of Particulars in answer to demand by defendant Frederick O. Londit			
Mar	7	1936	Filed notice of motion, affidavit and demurrer to indictment on behalf of Reginald P. Ray. (Name endorsed)			
Mar	7	1936	Filed affidavit of Reginald P. Ray in support of motion for leave to file the demurrer denied - settle order.			
			Filed Order denying motion of Reginald P Ray to inspect			

Case No. 1 2

Violation of

Attorney for Defendant:

DATE			PROCEEDINGS	No. of Words	CLERK'S FEES
					PLAINTIFF / DEFENDANT
Mar	7	1936	Filed notice of motion, affidavit and demurrer & indictment in behalf of Reginald P. Ray. (Memo. endorsed)		
Mar	7	1936	Filed affidavit #7059 by Byron D. - Motion for leave & file the demurrer denied - Still order.		
March 11, 1936			Filed Order denying motion of Reginald P Ray for leave to file demurrer to the indictment &c. - (Byrne J.)		
May	14	1936	Filed Amended Bill of Particulars		
May	15,	1936	Filed recognizance for J. Crawford Stevens $1,000 Continental Casualty Co		
"	15,	1936	" " Reginald P Ray $1,000 Continental Casualty "		
May	5,	1936	Trial begun as to all defts before Patterson D.J. On motion of defts counsel bails are reduced to $1000.00 each each deft. Motion granted no opposition Patterson D.J.		
May	6,	1936	Trial cont'd - motion to dismiss denied - Exc -		
			Trial cont'd on the following dates May 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 June 1		
June	2	1936	Trial cont'd - govt rests		
June	3,	1936	" " Motions made by defts - Denied Exc -		
			Trial cont'd on following dates June 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24		
			Motions by counsel of defts to dismiss the indictment and for a direction of an acquittal by the jury - Denied Exc -		
June	25	1936	Summation by defts		
June	26	1936	Summation by govt - Charge - Jury retires - Verdict as to some of the defendants. Westchester R.R. Co, J Crawford Stevens and Reginald P. Ray - guilty on all twenty counts as charged in the indictment. Philip N. Kunz guilty on counts 1, 2, 3, 4, 7, 8, 11, 14, 15, 16, 19 & 20 as charged with recommendation to the court for leniency. Jury polled - Bail cont'd. Sentences adj'd - Jury ordered returned to the jury room to further deliberate as to deft Condit - Ordered locked up for the night. To return at 9:30 a.m. June 27, 1936.		
June	27	1936	At 1:25 P.m. Jury report unable to agree as to defendant Condit - mistrial ordered. Jury discharged - Sentences - 6/29/36 - Patterson J.		
June	29	1936	Motion to set aside verdict as to J Crawford Stevens - Motion denied - Exception		
			Motion to set aside verdict as to Philip N. Kunz - Motion denied - Exception		
			Motion to set aside verdict and for a new trial as to Reginald P Ray - Motion denied - Exception		
			Motion to set aside verdict in fact as to Reginald P. Ray. Motion denied - Exception		

Continued on Page 1105½

Page 110 ~~Ex~~

LE OF CA

UNITED STATES
vs.
J. Crawford Stevens ~~dead~~
Frederick P Conduit
Reginald P. Ray and
Philip N Kuss
Westchester Title & Trust Co.

C-96-881

Violation of

Attorney f(Defendant:

DATE Month	Day	Year	PROCEEDINGS	No. of Words	CLERK'S FEES Plaintiff	Defendant
June	29	1936	Reginald P Ray. Sentenced to Five (5) years on each of counts 1 to 20 inclusive to run concurrently. Place of confinement to be designated by the Attorney General			
"	29	"	Issued commitment in triplicate as to Deft. Ray.			
"	29	"	J Crawford Stevens sentenced to One year & One day on each of counts 1 to 20 inclusive to run concurrently Place of confinement to be designated by the Attorney General.			
"	29	"	Issued commitment in triplicate as to deft. Stevens			
"	29	"	Philip N. Kuss - Sentenced to - One year and One day on each of counts 1-2-3-4-7-8-11-14-15-16 and 19 and 20 to run concurrently. Execution of sentence suspended. Probation for One year & One day, subject to the standing probation order of this Court - Counts 5-6-9-10-12-13-17-18 as to deft. Kuss dismissed		Counts 1 to 20 inclusive $10	
"	29	"	Westchester Title & Trust Co - Fined $1. on each of 20 counts Payment of fines suspended. Patterson J			
"	29	"	Bail as to Ray $2500. pending appeal. Paroled to give bail.			
"	29	"	Bail as to Stevens $2500. pending appeal Paroled to give bail.			

Docket 918

CRIMINAL DOCKET

Case No. 423

TITLE OF CASE

THE UNITED STATES

vs.

J. Crawford Stevens, et al

Cont'd from page 1105½

Violation of

C 96/881

Attorney for Defendant:

DATE			PROCEEDINGS	No. of Words	CLERK'S FEES	
Month	Day	Year			Plaintiff	Defendant
June	30	1936	Filed notice of appeal as to Defendant Reginald P. Ray & J Crawford Stevens (notice sent to Judge Patterson 6/30/36)			5 -

5

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,? :

Plaintiff, :

-against- :

J. CRAWFORD STEVENS, REGINALD P. RAY, :
PHILIP H. KUSS, FREDERICK P. CONDIT, :
and WESTCHESTER TITLE & TRUST COMPANY, :

Defendants. :

- -X

Names and addresses of Appellants:

Reginald P. Ray, 68 Crane Avenue, White Plains, N.Y.

J. Crawford Stevens, 289 Midchester Ave. White Plains, New York.

Name and address of Appellant Ray's attorneys:

Lynch, Cahn & Reed, 199 Main Street, White Plains, New York.

Name and address of Appellant Steven's attorneys:

Fogarty & Devlin, 225 Broadway, New York City.

Offense: Violation of Section 215, Title 18 U.S. C. A. (using the mails to defraud) and section 88, Title 18 U. S. C. A. (conspiracy to use the mails to defraud.)

Date of Judgment: June 29th, 1956

Brief description of judgment or sentence: Verdict of conviction on all twenty counts of indictment;

Sentence of two years on each count, to run concurrently, as to Appellant Ray; sentence of one year and a day on each count to run concurrently as to Appellant Stevens.

Name of prison where now confined if not on bail:

~~Remanded to bail~~, Paroled in custody of attorney

We, the above named appellants, hereby appeal to the United States Circuit Court of Appeals, for the Second Circuit, from the judgment above mentioned, on the grounds set forth below.

Reynold P. Ray
Appellant

J. Gaylord Stevens
Appellant

Dated, June 29th, 1936.

Grounds of appeal:

1. Denial of motion to dismiss the indictment and each count thereof, for failure to state facts sufficient to constitute a crime.

2. Reversible errors of the court in the admission of evidence.

3. Reversible errors of the court in the exclusion of evidence.

4. Denial of motions to withdraw a juror and for a mistrial for prejudicial occurrences during the trial.

5. Denial of motions to dismiss the indictment and to direct a verdict of acquittal, made at the end of the whole case.

6. Reversible errors in the charge of the court.

7. Reversible errors in the refusal of the court to charge as requested.

8. Denial of the motion to set aside the verdict and for a new trial.

9. Denial of the motion in arrest of judgment.

Sir:

PLEASE TAKE NOTICE that a

of which the within is a copy, was duly entered herein in the office of the Clerk of the City of

on the day of 193 .

Dated, 193 .

LYNCH, CAHN & WEED

ATTORNEYS FOR

OFFICE AND POST OFFICE ADDRESS

BAR BUILDING

WHITE PLAINS, N. Y.

To .

Attorney for

C96-881

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- against -

J. CRAWFORD STEVENS et al,

Defendants.

Duplicate

NOTICE OF APPEAL

LYNCH, CAHN & WEED

ATTORNEYS FOR Defendant Ray

BAR BUILDING

WHITE PLAINS, N. Y.

Fogarty & Phelan

attorneys for Defendant Ray

U.S. DISTRICT COURT FILED JUN 30 1936 S.D. OF N.Y.

U.S. CIRCUIT COURT OF APPEALS SECOND CIRCUIT FILED AUG 6 1936 CLERK

COPY RECEIVED JUN 30 1936 Lamar Hardy U.S. ATTORNEY

by Walter Brauer Spec. Asst. Atty. Gen'l

[fol. 10] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

C—96-881

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

REGINALD P. RAY, Defendant-Appellant

NOTICE OF MOTION TO DOCKET AND DISMISS APPEAL

SIR:

Please Take Notice that upon the certificate of the Clerk of the United States District Court for the Southern District of New York, dated November 12, 1936, and upon the order of Honorable Robert P. Patterson, Judge of the United States District Court for the Southern District of New York, dated November 2, 1936, and upon the affidavit of Bernard Tompkins, Special Attorney of the United States Department of Justice, sworn to November 12, 1936, hereto annexed, the undersigned will move this Court at the Present Term thereof, held in Room 1705 in the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on November 16, 1936 at 10:30 A. M. or as soon thereafter as counsel can be heard, for an order docketing the above entitled cause and dismissing the same, because of the failure of the defendant-appellant to docket such cause within the time fixed by Rules VIII and IX of the Rules of the Supreme Court in Criminal Cases, and also for the reason that the aforesaid order of Judge Patterson was irregular, informal and insufficient in that [fol. 11] it purported to settle a bill of exceptions which did not comply with Rule IX of the aforesaid Rules of the Supreme Court in Criminal Cases (28 U. S. C. A. Section 723a) and for such other and further relief as this Court may deem proper in the premises.

Dated, New York, N. Y., November 12, 1936.

Yours, etc., Walter Brower, Special Assistant to the Attorney General of the United States. Office & P. O. Address, United States Court House, Foley Square, New York, N. Y.

To Reginald P. Ray, Esq., Appearing in Person, 175 Main Street, White Plains, N. Y.

[fol. 12] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

C—96-881

[Title omitted]

CERTIFICATE OF CLERK

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the above proceeding was commenced by the filing of an indictment on April 29, 1935 in the United States District Court for the Southern District of New York and that thereafter on June 26, 1936 the Appellant (Defendant Below) Reginald P. Ray was convicted before Honorable Robert P. Patterson, United States District Judge, and a jury and that on June 29, 1936 said Reginald P. Ray was sentenced to a term of imprisonment of two years on each of counts one to twenty, inclusive, to run concurrently.

That thereafter on June 30, 1936 the appellant Ray filed a notice of appeal.

That thereafter on July 27, 1936 the appellant Ray filed an order signed by Judge Patterson extending the time to file the assignment of errors and bill of exceptions to and including November 1, 1936.

That thereafter on November 2, 1936 the appellant Ray filed an order signed by Judge Patterson settling the bill of [fol. 13] exceptions and on the same day filed a bill of exceptions consisting of seven (7) volumes and the assignment of errors.

That other than the above, no orders have been made enlarging or extending the time of the said appellant to docket the cause and file the record in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, N. Y., November 12, 1936.

Charles Weiser, Clerk, United States District Court, Southern District of New York. (Seal.)

[fol. 14] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF BERNARD TOMPKINS

STATE OF NEW YORK,
Southern District of New York,
County of New York, ss:

Bernard Tompkins, being duly sworn, deposes and says:

I am a Special Attorney of the United States Department of Justice and, under the supervision of Walter Brower, Special Assistant to the Attorney General of the United States, was in charge of the preparation and trial of the above case.

On June 26, 1936, a judgment of conviction was entered in the United States District Court for the Southern District of New York, Judge Robert P. Patterson presiding, upon the verdict of a jury finding the appellant Reginald P. Ray and J. Crawford Stevens and Philip H. Kuss guilty of a violation of the Mail Fraud Statute and conspiracy (18 U. S. C. A. sections 338 and 88). The jury disagreed as to the defendant Frederick P. Condit.

Thereafter, on June 29, 1936 Judge Patterson ordered the following sentences:

[fol. 15] Reginald P. Ray—2 years imprisonment.

J. Crawford Stevens—1 year and 1 day imprisonment.

Philip H. Kuss—Sentence suspended. Probation for 1 year.

A notice of appeal was filed by the appellant Ray on June 30, 1936. The defendants Stevens and Kuss are not appealing.

On July 27, 1936 Judge Patterson signed an order (Exhibit "A" annexed hereto) extending the time to file and serve the assignment of errors and bill of exceptions up to and including November 1, 1936.

On October 29, 1936 a motion was made before Judge Patterson, brought on by order to show cause, to settle the stenographer's minutes of the trial as and for the bill of exceptions. This motion was denied.

Thereafter, on November 2, 1936 the appellant Ray presented to Judge Patterson five (5) volumes of typewritten

stenographic minutes of the trial, with colloquy of counsel omitted, and two (2) volumes containing the summation of Walter Brower and the charge of the Court and other proceedings after the trial, consisting of 3981 pages in all, and requested that they be settled and signed as the bill of exceptions in the case. This motion was granted and an order dated November 2, 1936 (Exhibit "B" annexed hereto) was signed. Walter Brower, Special Assistant to the Attorney General, opposed this motion for the following reasons:

First. The proposed bill of exceptions was not submitted to him and he had had no opportunity to inspect the proposed bill of exceptions to determine its accuracy or fullness.

[fol. 16] Second. That the proposed bill of exceptions did not comply with Rule IX of the Rules of the Supreme Court in Criminal Cases (28 U. S. C. A. section 723a) in that it was not set forth in condensed and narrative form, although the appellant had had the minutes in his possession for over four months. (Your deponent has been informed by Mr. James A. Trumbull, Jr., of the Southern District Court Reporters, that the stenographic minutes of the trial were supplied to the defendants in the case each day as the trial progressed, except the charge of the Court and the summation of Walter Brower, which were furnished to the appellant Ray on July 30, 1936.)

Third. Judge Patterson was without power on November 2, 1936 to sign the bill of exceptions, inasmuch as the extended time under his order of July 27, 1936 had expired on November 1, 1936, and that the time for docketing the said cause and filing said record in this Court had expired.

Wherefore, your deponent prays that this Court docket the said cause and dismiss the appeal upon the grounds set forth above, and for such other and further relief as may be just and proper in the premises.

No previous application for the relief herein asked has heretofore been made.

Bernard Tompkins.

Sworn to before me this 12th day of November, 1936. John V. B. Merritt, Notary Public, Westchester County. N. Y. Co. Clk's No. 9, Reg. No. 7118. Commission expires March 30, 1937. (Seal.)

[fol. 17] Copy

EXHIBIT "A" TO AFFIDAVIT

At a term of the United States District Court held in and for the Southern District of New York at the United States Federal Courthouse, Borough of Manhattan, City of New York, on the 27th day of July, 1936.

Present: Hon. Robert P. Patterson, U. S. District Judge.

THE UNITED STATES OF AMERICA, Plaintiff,

against

J. CRAWFORD STEVENS, FREDERICK P. CONDIT, REGINALD P. RAY, Philip H. Kuss and the Westchester Title & Trust Company, Defendants

Order

Upon reading and filing the annexed affidavit of Reginald P. Ray, sworn to the 27th day of July, 1936, it is

Ordered, that the time of the defendant Reginald P. Ray to file and serve his assignment of errors and bill of exceptions be and the same hereby is extended to and including the 1st day of November 1,936.

Robert P. Patterson, U. S. D. J.

[fol. 18] Copy

EXHIBIT "B" TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. C-96881

THE UNITED STATES OF AMERICA, Plaintiff,

against

J. CRAWFORD STEVENS, FREDERICK P. CONDIT, REGINALD P. RAY, Philip H. Kuss, and the Westchester Title & Trust Company, Defendants

Order Settling Bill of Exceptions

R. P. P. It is Hereby Ordered, The Special Assistant to the Attorney General appearing in opposi-

tion, that the foregoing bill of exceptions, consisting of five (5) volumes of the typewritten stenographic minutes of the trial, one (1) volume containing the summation of Walter Brower, Special Assistant United States Attorney General, and one (1) volume containing the charge of the court and other proceedings after the trial, consisting of three thousand nine hundred and eighty-one (3981) pages in all, and containing all the evidence on the trial of this cause, colloquy of counsel being omitted, having been R. P. P. presented within the time allowed to wit, on November 2, 1936 and having been examined, is allowed, sealed, signed and ordered on file as part of the record herein; and it is further

Ordered, that the originals of any exhibits R. P. P. marked in evidence or for identification at the trial shall be considered a part of the bill of exceptions with the same force and effect as if complete copies thereof were incorporated therein, and that either [fol. 19] party may, upon the argument in any court of review, present the originals of each and all such exhibits.

November 2, 1936.

(Signed) Robert P. Patterson, U. S. D. J.

[fol. 20] Motion granted.

M. T. M. L. H. T. W. S.

Nov. 25/36.

[fol. 21] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF REGINALD P. RAY, ON MOTION TO DOCKET AND DISMISS APPEAL

STATE OF NEW YORK,
County of New York, ss:

Reginald P. Ray, being duly sworn, deposes and says:

I am the defendant-appellant in the above captioned cause.

The order signed by Judge Paterson on July 27, 1936 extended the time within which to settle and file the bill of exceptions and to file the assignment of errors "to and in-

cluding the first day of November, 1936". About the middle of October it became apparent that the condensation of the record, because of its size and the financial handicaps under which I am laboring, could not be completed by November 1st. An application was, therefore, made to Judge Patterson on Tuesday, October 20th for an order further extending the time. At that time Messrs. Brower and Tompkins, representing the United States, suggested that it was beyond the power of the trial judge to further extend the time.

Upon investigation I ascertained that there were decided cases, in other circuits, construing Supreme Court Rule IX in criminal cases, holding that a further extension could not be granted under the circumstances of my case. The order allowed by Judge Patterson was, therefore, not entered.

[fol. 22] Realizing that I was virtually out of court if further time was not obtained, I immediately sought relief in the Circuit Court of Appeals. On Thursday, October 22nd, Judge Manton signed an order to show cause why an extension should not be granted by this court. The motion was argued on Tuesday, October 27th before Judges Manton, L. Hand and Swan. At that time this court declared itself powerless to grant further time, or to give any other relief. The question of the power of the trial judge to order a further extension was raised and, while expressing no opinion, the judges present indicated they had grave doubt as to the existence of such power. It was thereupon suggested by them that, under the circumstances of my case, in order to avoid any jurisdictional question, an application be made to the trial judge for an order settling the typewritten stenographer's minutes of the trial as the bill of exceptions and that thereafter an application might be made to this court for time to prepare and print a condensed record.

Pursuant to this suggestion, a motion was made on Thursday, October 29th before Judge Patterson, brought on by order to show cause, signed on Wednesday, October 28th, to settle the stenographer's minutes of the trial as and for the bill of exceptions. This motion was argued on the morning of October 29th, the United States submitting a memorandum in opposition thereto. Judge Patterson reserved decision to give me an opportunity to sub-

mit an answering memorandum which I did late in the afternoon. He thereupon denied the motion.

Thereupon on Friday, October 30th, an informal conference was held in Judge Manton's chambers at which Judge Patterson and Messrs. Brower and Tompkins were present. At that time Judge Patterson suggested that if the colloquy of counsel appearing in the typewritten stenographer's minutes was stricken therefrom that Supreme Court [fol. 23] Rule 8, which required a condensation of testimony might be complied with and that since my time expired on Sunday, November 1st, such an application might be made the following day. Messrs. Brower and Tomkins agreed to appear on Monday morning without a formal notice or order to show cause. I thereupon spent the week-end in going through the typewritten minutes and striking all colloquy of counsel therefrom with a red pencil. On Monday, November 2nd, a motion was made before Judge Patterson to settle the typewritten minutes thus condensed as and for the bill of exceptions. This motion was granted. Accordingly the bill of exceptions and assignment of errors were filed with the clerk of the District Court for the Southern District of New York on the afternoon of November 2nd.

Reginald P. Ray.

Sworn to before me this 16th day of November, 1936. Leo. Cohen, Notary Public. N. Y. Co. Clks. No. 156, Reg. No. 8C169. Bronx Co. Clks. 13 Kings Co. Clks. 131. Commission expires March 30, 1938.

[fol. 24] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES, Plaintiff-Appellee,

vs.

REGINALD P. RAY, Defendant-Appellant

ORDER DISMISSING APPEAL—Filed December 4, 1936

A motion having been made herein by counsel for the appellee to dismiss the appeal for lack of jurisdiction;

Upon consideration thereof it is
Ordered that said appeal be and hereby is dismissed.
Further ordered that a mandate issue accordingly.
Wm. Parkin, Clerk.

[fol. 25] [File endorsement omitted]

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

C—96-881

[Title omitted]

PETITION FOR REHEARING—Filed December 9, 1936

To the Honorable United States Circuit Court of Appeals for the Second Circuit:

The petition of Reginald P. Ray respectfully shows:

1. Your petitioner on the 27th day of June, 1936 was convicted in the United States District Court for the Southern District of New York before the Honorable Robert P. Patterson and a jury of a violation of the Mail Fraud Statute and of conspiracy (18 U. S. C. A. sections 338 and 88).

2. The trial comprehended a period of approximately eight weeks and the transcript of testimony therein comprises about four thousand pages. Over five hundred exhibits were received in evidence.

3. Your petitioner was represented at the trial by Monroe Cahn, Esq., of Messrs. Lynch, Cahn & Weed, of White Plains.

4. Within five days after said conviction, a notice of appeal was filed.

5. Due to the voluminous record, it was impossible to prepare the bill of exceptions within the thirty days allotted by the rules of court and the obtaining of an extension was therefore imperative. The trial judge was away on vacation and an order extending the time within which to settle and file the bill of exceptions was accordingly not

entered until the 27th day of July, 1936. On said date [fol. 27] Judge Patterson granted an extension "to and including the 1st day of November, 1936", which was a Sunday.

6. Financial difficulties made it impossible for your petitioner to engage his trial counsel to conduct the appeal herein and it therefore became necessary to conduct his own appeal with such assistance as your petitioner's finances would permit. Although your petitioner has been a member of the bar since 1904 he has never been in active practice.

7. During the first week of August, 1936, your petitioner succeeded in obtaining the assistance of Messrs. Richard E. Silberman and Benjamin L. Stern, two newly admitted members of the New Jersey bar. The said Messrs. Silberman and Stern were to prepare an assignment of errors and a brief.

8. Your petitioner's new assistants had not been present at the trial and it was thus necessary for them to read the voluminous transcript of testimony with great care in order to ascertain the errors to be assigned.

9. On various dates during August of 1936 your petitioner endeavored to communicate with Mr. Walter Brower and Mr. Bernard Tompkins, who conducted the prosecution for the Government, in order to arrange a meeting with them. The cooperation of the Government was essential in arriving at any agreement as to the form and the contents of the bill of exceptions.

10. Although there was an apparent willingness to cooperate on the part of Mr. Brower and Mr. Tompkins, circumstances prevented a meeting with them until about the 15th day of September, 1936. At said time your petitioner, together with Mr. Silberman and Mr. Stern, discussed with Mr. Brower and Mr. Tompkins, the question of condensing the testimony. At this meeting Mr. Brower and Mr. Tompkins expressed the opinion that since one of the assign- [fol. 28] ments of error was the failure of the trial judge to direct a verdict and that the weight of evidence would be argued, it would not be practicable to attempt a condensation of the testimony and were of the opinion that the entire

record would be necessary. However, it was suggested that a sample of the condensation of the testimony of a few witnesses be submitted to them for their consideration. Accordingly, the testimony of several witnesses, consisting of approximately 600 pages of the stenographer's transcript, was condensed and submitted to Mr. Brower and Mr. Tompkins. Late in September, Mr. Tompkins informed Mr. Silberman and Mr. Stern that upon considering the samples submitted, they had decided that a condensation of this character was practicable. They stated that they would make very few changes; that they were redictating the condensation submitted; and that we should proceed to condense the remainder of the testimony with the exception of the testimony of the defendant Ray, your petitioner, which they felt would have to be retained intact. Thereafter, the work of condensing the record progressed as rapidly as possible and by the middle of October another 1,000 pages was ready for submission. The material submitted to Mr. Brower and Mr. Tompkins for their approval has ever been returned with corrections.

11. A few days prior to October 20, 1936, when it was apparent that no condensation could be agreed upon within the time previously allowed, another meeting was had with Mr. Brower and Mr. Tompkins, at which time they agreed that while they would not consent they would not oppose an application to the trial judge for a further extension. Accordingly, on October 20, 1936, your petitioner, applied to the trial judge for an order extending the time within which to settle and file the bill of exceptions and assignment of errors herein for a further period of thirty days. At the suggestion of Mr. Tompkins, the time was enlarged to two months and the trial judge stated that he would grant such [fol. 29] extension. The Government stated that they would not oppose the granting of the relief sought but would not consent thereto for the reason that in their opinion the trial judge had no jurisdiction to allow further time after the original thirty days had expired. (Rules of the Supreme Court in Criminal Cases, Rule IX.)

12. Upon investigation, it was found that while there was no case in this circuit construing Rule IX, there were decisions in other circuits holding that the trial judge has no

power to grant an extension once the thirty day period has elapsed.

Yep v. U. S., 81 Fed. (2d) 637 (C. C. A. 10th);
Gallagher v. U. S., 82 Fed. (2d) 721 (C. C. A. 8th);
Wolpa v. U. S., 84 Fed. (2d) 829 (C. C. A. 8th);
Cusamano v. U. S., 85 Fed. (2d) 132 (C. C. A. 8th);
Spero v. U. S., 85 Fed. (2d) 134 (C. C. A. 8th).

And further in the case of U. S. v. Adamowicz, 82 Fed (2d) 288 (C. C. A. 2d), this circuit held that the Circuit Court of Appeals has no power to grant said extension.

13. Your petitioner thus found it impossible to condense the record within the time allowed and that neither the trial court nor this court had power to grant a further extension. In this dilemma your petitioner immediately sought relief in this court and on Thursday, October 22, 1936, Judge Manton signed an order to show cause why an extension should not be granted by this court or for such other relief as might be proper. The said motion was made returnable and was argued on Tuesday, October 27 before Judges Manton, L. Hand and Swan. It was there argued that under Rule IV of the Supreme Court in Criminal Cases, which provides that the Circuit Court shall have "supervision and control of the proceedings on the appeal including the proceedings relating to the preparation of the record on appeal" and that the Circuit Court may "modify any order made by the trial court or by any judge in relation to the prosecution of the appeal." This court might enter an order modifying the order made by Judge Patterson on [fol. 30] July 27, 1936 so as to enlarge the original period of extension. Thus by enlarging the time therein granted through the exercise of its power to modify, this court would enable the order of the trial judge to accomplish the result sought and give the defendant, your petitioner, the time that Judge Patterson would have allowed, had it been then apparent that more time would be required.

14. At said argument, this court declared itself powerless to grant further time and while expressing no opinion, the judges present indicated that they had grave doubt as to the power of the trial judge to grant a further extension. The Court further said that it did not consider Rule IV broad enough to grant the relief sought and thereupon unanimously suggested, as a compromise measure that,

under the circumstance of my case, in order to avoid any jurisdictional question, an application be made to the trial judge for an order settling the typewritten stenographer's minutes of the trial as the bill of exceptions and that thereafter an application might be made to this court for time to prepare, agree upon, and print the condensed record, under Rule IX, in Criminal Cases, which provides: "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate."

A. 15. Judge Hand, at this time stated in substance, "I do not believe that you will oppose such an application, Mr. Brower." Mr. Brower stated that he might oppose this application. Whereupon, Judge Hand said in substance, "I think that upon reconsideration, you will withdraw your opposition." And Judge Manton said
A. in substance, "That is the direction of this court."

16. Pursuant to this suggestion, an order to show was [fol. 31] obtained from Judge Patterson on the following day, Wednesday, October 28th, for an order to settle the stenographer's minutes as the bill of exceptions. This motion was argued on the morning of Thursday, October 29th and Mr. Brower and Mr. Tompkins submitted a memorandum in opposition thereto in which they contended that Judge Patterson had no power to sign the bill of exceptions in the form presented since it was not in condensed and narrative form as prescribed by Rule 8 of the Supreme Court. The Government cited as authority the following cases:

Linn v. U. S., 251 Fed. 476;
Chicago v. Le Moyne, 119 Fed. 662;
Fraina v. U. S., 258 Fed. 28;
Rosen v. U. S., 271 Fed. 651;
Barbour Asphalt Co. v. Standard Co., 275 U. S. 372.

Judge Patterson reserved decision in order to give your petitioner an opportunity to submit an answering memorandum which was done at 4 o'clock the same afternoon. In said answering memorandum, it was pointed out that in all of the cases cited by the Government, the appeal was heard on the merits, although, the practice was condemned

and it was argued that since the procedure had been suggested by this court and that since your petitioner intended to complete a condensed record for the use of this court, and had so stated to this court, that every objection to the settling of the bill of exceptions in the form presented would be cured.

17. The following morning October 30, 1936 at 9:30 a. m. Mr. Silberman and Mr. Stern appeared before Judge Patterson's secretary to ascertain the disposition of this application. They thereupon learned that Judge Patterson had signed the order settling the bill of exceptions in the form presented, after considering your petitioner's memorandum and that thereafter he had stricken out his name and denied the motion. Thereupon, your petitioner, together with Mr. Silberman and Mr. Stern appeared before Judge Manton [fol. 32] in Chambers and discussed what had transpired. Whereupon, Judge Manton requested Mr. Brower and Mr. Tompkins to appear before him, which was immediately done. Judge Manton thereupon stated to Mr. Brower that it was his recollection that there was to be no opposition to your petitioner's application since it was in the nature of a compromise and he further stated that he would attempt to convene the court that afternoon to see what could be done.

18. Thereupon, at Judge Manton's direction, your petitioner, Mr. Silberman, Mr. Stern, Mr. Brower, and Mr. Tompkins, appeared in Judge Manton's chambers at 2:30 that afternoon. This was Friday, October 30th. Judge Manton had been unable to convene the court but Judge Patterson, the trial judge, was present and an informal conference was held. At this time Judge Patterson was informed that the extension expired on November 1st, which was a Sunday and he thereupon stated in the presence of Mr. Brower and Mr. Tompkins that he felt that there might be a compliance with Rule 8, if your petitioner, together with Mr. Silberman and Mr. Stern would over the weekend delete the colloquy of counsel from the typewritten stenographer's minutes since there would then be a condensation. He thereupon suggested that we appear before him on Monday, November 2nd since the time expired on a Sunday and Mr. Brower and Mr. Tompkins agreed to appear before Judge Patterson without a formal notice or order to show cause.

19. Thereupon, your petitioner, together with Mr. Silberman and Mr. Stern, spent the weekend in going through the voluminous record and striking all colloquy of counsel therefrom with a red pencil. These deletions reduced the minutes by some 700 pages.

20. Thereupon on Monday, November 2nd at 9:30 in the morning, a motion was made before Judge Patterson to [fol. 33] settle the typewritten minutes thus condensed as the bill of exceptions. Mr. Brower and Mr. Tompkins opposed this application for the reason that it was filed out of time, citing as authority Maresca v. U. S. 277 Fed. 727 (C. C. A. 2d), cert. den. 257 U. S. 657 which case is a direct authority for the proposition that when the last day for filing a bill of exceptions falls on a Sunday, the appellant does not have the next court day. In view of this case, Judge Patterson stated that he was powerless to grant our application and suggested that we might apply to this court for a writ of mandamus compelling him to settle the bill of exceptions as presented within time.

20. We immediately examined the law and found that the Maresca case was decided prior to Rule XIII of the Supreme Court in Criminal Cases, which rule excludes Sunday in computing time. We, thereupon, reappeared before Judge Patterson and asked him whether he would listen to a reargument. We stated that we felt that if this court would issue a writ of mandamus, he could be convinced to grant the application. Accordingly, the application was renewed before Judge Patterson in the presence and with the opposition of Mr. Brower and Mr. Tompkins. Judge Patterson granted the motion and signed an order settling the stenographer's minutes as condensed as the bill of exceptions. Judge Patterson stated that error might have been committed and that he did not wish to deprive your petitioner of his appeal. Accordingly, the bill of exceptions and assignment of errors were filed with the clerk of the District Court for the Southern District of New York on the afternoon of November 2, 1936.

21. On November 16, 1936, Mr. Walter Brower moved this court for an order docketing this cause and dismissing the appeal herein for failure to file the bill of exceptions within time and for the reason that the bill of exceptions as [fol. 34] filed did — comply with Rule IX of the Supreme

Court in Criminal Cases. This motion was granted on November 26, 1936. No written opinion was rendered.

22. At the argument of said motion, it was urged on behalf of your petitioner that as a matter of law, the bill of exceptions herein was filed within time and that while it was not strictly in the proper form, the requirements of Supreme Court Rule 8 are not jurisdictional and in the circumstances the appeal should not be dismissed without a hearing on the merits.

23. It was argued by the Government that the rule requiring condensation is jurisdictional in view of the new Supreme Court Rules in Criminal Cases (28 U. S. C. A. following 723 a).

24. Your petitioner respectfully urges that the new rules in Criminal Cases do not render the form of a bill of exceptions a jurisdictional defect. Bills of exceptions were formerly governed by Supreme Court Rule 8. The new Rules in Criminal Cases provide (Rule IX) that "Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States." This provision, therefore, has the identical effect as if the new rules provided that the form of bills of exceptions shall be "as heretofore." Moreover, Rule 8 itself contemplates a bill of exceptions that is not in condensed and narrative form since it reads "save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

25. Your petitioner respectfully states that this Court has the power to determine in which cases to apply the foregoing provision of Rule 8.

26. Your petitioner further states that he can find no reported case in which this circuit has dismissed an appeal without considering the merits for a defect in the form of [fol. 35] the bill of exceptions and that since the bill of exceptions is in the form suggested by this Court and in view of the further fact that there is some measure of compliance with Rule 8 in that the bill of exceptions is in condensed, though not in narrative form, the dismissal of the appeal herein is too harsh a penalty.

27. Your petitioner further states that this court has rendered no written opinion stating whether the dismissal was for the reason that: (a) the bill of exceptions was not filed within the time allowed; (b) the bill of exceptions was not in proper form, a jurisdictional defect; (c) the bill of exceptions was not in proper form and although not jurisdictional the court's discretionary power would not be exercised in petitioner's behalf; (d) this court would hear the appeal save for the jurisdictional defect in form; (e) or for a combination of the aforesaid reasons.

28. Your petitioner further alleges that he is desirous of, and intends to petition the United States Supreme Court for a writ of certiorari reviewing this court's action in dismissing his appeal and further states that he has been advised that the granting of the writ in the absence of a ground of decision in this court is highly improbable. In view of the novelty and importance of the legal propositions involved, it is respectfully urged that it is desirable that this court indicate the ground of its decision, so that a review may be had.

Wherefor- your petitioner respectfully prays:

1. That this Honorable Court may grant your petitioner a rehearing on the motion to dismiss the appeal herein, or in the alternative, that this Court render a written memorandum, stating the grounds of said dismissal.

2. For such other and further relief as to this Court may seem just and proper in the premises.

Wherefor- your petitioner will ever pray, etc.

Reginald P. Ray, Petitioner.

Dated December 9th, 1936.

[fol. 36] UNITED STATES OF AMERICA,
Southern District of New York, ss:

Richard E. Silberman, of full age, being duly sworn, according to law, upon his oath deposes and says:—

I am the Richard E. Silberman mentioned in the foregoing petition.

I have read the said petition and the fact, matters and things therein contained, so far as they relate to my acts

are true and so far as they relate to acts of others, I believe them to be true.

Richard E. Silberman.

Subscribed and sworn to before me this 9" day of December, 1936. Mary E. Cunningham, Notary Public. (Seal.)

[fol. 37] UNITED STATES OF AMERICA,
Southern District of New York, ss:

Benjamin L. Stern, of full age, being duly sworn, according to law, upon his oath deposes and says:—

I am the Benjamin L. Stern mentioned in the foregoing petition.

I have read the said petition and the facts, matters and things therein contained, so far as they relate to my acts are true and so far as they relate to acts of others, I believe them to be true.

Benjamin L. Stern.

Subscribed and sworn to before me this 9" day of December, 1936. Mary E. Cunningham, Notary Public. (Seal.)

[fol. 38] UNITED STATES OF AMERICA,
Southern District of New York, ss:

Reginald P. Ray, of full age, being duly sworn, according to law, upon his oath deposes and says:—

I am the petitioner in the foregoing petition named and I am acting as my own counsel in the conduct of the appeal herein.

I have read my said petition and the facts, matters and things therein contained, so far as they relate to my acts are true and so far as they relate to acts of others, I believe them to be true.

My said petition is filed in good faith for what I verily believe to be just and legal cause and it is not intended for the purpose of delay.

Reginald P. Ray.

Subscribed and sworn to before me this 9th day of December, 1936. Mary E. Cunningham, Notary Public. (Seal.)

[fol. 38½] [File endorsement omitted.]

[fol. 39] In United States Circuit Court of Appeals for the Second Circuit

United States of America, Plaintiff-Appellee,

against

Reginald P. Ray, Defendant-Appellant

Before Manton, L. Hand and Swan, Circuit Judges

Appeal from the United States District Court for the Southern District of New York. Defendant was convicted for violations of the Mail Fraud Statutes and Conspiracy (18 U. S. C. A. §§ 338,88). Motions for reargument of motions to correct the record; also to dismiss appeal. Motion to correct the record denied; appeal dismissed.

Walter Brower, Esq., Special Assistant to the Attorney General of the United States.

Reginald P. Ray, Appearing in Person.

Opinion—Filed December 22, 1936

Per Curiam:

The appellant was convicted of violations of the Mail Fraud Statute and conspiracy (35 Stat. 1130; 35 Stat. 1096; 18 U. S. C. A. §§ 338,88) and appeals from the judgment entered. The trial lasted eight weeks; the testimony comprised about 4,000 pages and there were 500 exhibits received in evidence. The bill of exceptions was not settled and filed within the 30 days allowed by Rule IX of the Rules [fol. 40] of Practice and Procedure in Criminal Cases. An extension was granted by the trial judge up to and including the 1st of November, 1936, which was a Sunday.

The appellant says that financial difficulties made it impossible for him to engage counsel to prepare the record on appeal and he endeavored to do so personally. He is a member of the bar but not engaged in active practice. In the first week of August, 1936, he received the assistance of two newly admitted members of the New Jersey bar who were to prepare his bill of exceptions, the record on appeal and the brief of argument. Unsuccessful efforts were made toward an agreement with the prosecutor as to the condensation of the record and on October 20, 1935, realizing that no condensation of the record could be agreed upon within

the time allowed, appellant applied to the trial judge for an order to further extend the time within which to settle and file the bill of exceptions. The trial judge indicated a willingness to do so but upon investigation it was found that Rule IX of the Criminal Rules gave no power to grant such extension after the 30 day period had elapsed. Yep v. United States, 81 Fed. 2, 637 (C. C. A. 10); Gallagher v. United States, 82 Fed. 2, 721 (C. C. A. 8); Wolpa v. United States, 84 Fed. 2, 829 (C. C. A. 8). Nor does this court have power to grant such extension. United States v. Adamowicz, 82 Fed. 2, 288 (C. C. A. 2).

The appellant contends it was impossible, within the remaining time before November 1, to condense the record or reduce it to narrative form as required by Rule VIII of the Supreme Court rules. The stenographer's minutes, reduced by striking out some 700 pages of colloquy of coun- [fol. 41] sel were presented to the trial judge who on November 2, 1936, settled it as the bill of exceptions.

In its presented form the bill was insufficient, but counsel contends that this court has power to cure this defect under the authority of Rule IX providing:

"The appellant court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate."

The motion to so correct the record was made simultaneously with this motion to dismiss.

If the bill of exceptions is sufficient, its settlement on the day after Sunday (November 1, 1936) would be sufficient. Rule XIII, Criminal Rules and Practice. A bill of exceptions must be settled in accordance with Supreme Court Rule VIII which requires that

"Only so much of the evidence shall be embraced • • • as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

By the assignment of errors, appellant raised the question of an alleged error made below in failing to dismiss for lack of evidence to support the indictment. To examine such alleged error requires an examination of all the evidence, but to comply with Rule VIII the evidence must be reduced to narrative. In Barber Asphalt Co. v. Standard Asphalt Rubber Co. (275 U. S. 372), the court held a cause could be remitted to the district court by the Circuit Court of Appeals to conform a transcript to Equity Rule 75(b). In the appellant's case, however, Rule IX of the Criminal Rules of Practice and Procedure imposes a time limit upon [fol. 42] the settlement of the bill of exceptions which cannot be enlarged. If the bill of exceptions were remitted to the trial judge, he would be powerless to correct, amend or resettle it for the time to do so has expired.

The provision of Rule IX authorizing the Circuit Court of Appeals to entertain a motion by either party for the correction, amplification or reduction of the record filed with the appellate court or issue directions to the trial court in relation thereto would not authorize us to do so with reference to the bill of exceptions. We may correct a record so as to properly reflect the proceedings in the district court by adding papers not certified by the clerk or striking out some which may not be necessary. We may, of course, correct our own record if it is not stated properly.

The bill of exceptions, however, is determined and settled by the district judge alone and we may not correct or change it. The trial judge can no longer act to put the evidence in narrative form and we have no power to order him so to do. We have the power to strike out the bill of exceptions for noncompliance with the rule (Allen Gasoline Co. v. Franklin Fire Ins. Co., 65 Fed. 2, 609 [C. C. A. 9]), whose purpose is to expedite appeals. This appellant had four months and has offered insufficient excuses for his delinquency. The bill of exceptions was insufficient. Allen Gasoline Co. v. Franklin Fire Ins. Co., supra. See, Fraina v. United States, 255 Fed. 28 (C. C. A. 2); McNamara v. Cerf, 4 Fed. 2, 997 (C. C. A. 2).

The motion to amend the record is denied and the motion to dismiss the appeal is granted.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR REARGUMENT—Filed December 22, 1936

A motion having been made herein by counsel for the appellant for a reargument of the motions to correct the record and to dismiss the appeal;

Upon consideration thereof it is

Ordered that said motion be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 44] [File endorsement omitted.]

[fol. 45] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 46] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 29 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REYNOLDS ROBERTSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Summary Statement of Matter Involved.

Petitioner, convicted (June 26, 1936) and sentenced (June 29, 1936) in the District Court of the United States for the Southern District of New York for violation of the mail fraud and conspiracy statutes (R. 4, 5), filed prompt (June 30, 1936) and timely [1] notice of appeal to the Circuit Court of Appeals (R. 6).

In the statement of grounds of appeal accompanying the notice (R. 9) the point was made, among others, that as a matter of law there was no evidence sufficient to sustain the verdict or judgment. It became necessary, there-

[1] Criminal Appeals Rule III, 292 U. S. 662. ("Criminal Appeals Rules" are hereinafter cited as C. A. R.)

fore, that the narration and condensation[2] should embrace the whole of the evidence—4,000 pages of testimony and 500 exhibits (R. 29)—in order that the bill of exceptions might show affirmatively that it contained the purport and substance of all the evidence and thus avoid the presumption that omitted evidence sustained the verdict and judgment.[3] July 27, 1936, the trial judge (Patterson, J.), on application, extended the time to file and serve the bill of exceptions and assignment of errors until November 1, 1936 (R. 15).

Financially unable to engage his trial counsel to conduct the appeal, petitioner undertook the task himself[4]—with the assistance, commencing early in August, of two newly admitted members of the New Jersey bar (R. 20, 29). After these gentlemen had read the record in connection with the preparation of the assignment of errors, efforts were made to confer with Government counsel respecting the form and contents of the bill of exceptions; but these were unavailing until the middle of September, at which time such a conference was held (R. 20). Government counsel were of opinion that no condensation at all was practicable in view of the nature of the assignments of error; but they agreed to receive and consider a sample narration and condensation of a part of the testimony (R. 20-21). Petitioner thereafter submitted a sample narration and condensation of 600 pages of the testimony. Late in September, Government counsel advised that they were correcting and redictating the condensation submitted, but that the testimony of this petitioner would have to go in *verbatim* (R. 21).

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[2] C. A. R. IX, par. 2; Supreme Court Rule 8.

[3] *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 390, 391; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 488-490.

[4] Petitioner has been a member of the Bar since 1904, but has never been in active practice (R. 20, see R. 29).

By middle October petitioner had another 1,000 pages ready for submission—but Government counsel had not at that time, and have never at any subsequent time, returned with their corrections even the first batch of narrative and condensation submitted to them (R. 21).

[It may be noted at this point that the case had aroused wide public interest in New York; that it had been sharply contested through the eight weeks trial; that the evidence on vital points was admittedly circumstantial; that a Special Assistant to the Attorney General had been sent from another jurisdiction to try it in conjunction with the local U. S. Attorney's office; and that among the chief points upon appeal were petitioner's contentions (a) that this special prosecutor got his verdict by an indefensible appeal to passion and prejudice in his summation, and (b) that a woman attorney of the Department of Justice, assigned to assist in the prosecution of this case, had given an interview to a leading New York newspaper during the course of the trial charging this petitioner with attempting to influence a witness in this case; that the newspaper report of this interview came to the attention of the jury; that the special prosecutor and the Assistant U. S. Attorney knew of the interview, and yet no steps were taken to get the woman attorney's charge, and the issue as to the truth thereof, to the jury otherwise than in the newspaper columns.[5]]

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[5] By reason of a procedural error of the Circuit Court of Appeals, and, more especially, by reason of a consistent practice followed by the Clerk's Office of the District Court of the United States for the Southern District of New York in flat disregard of C. A. R. IX, par. 3 (more particularly discussed hereinafter) the bill of exceptions, assignments of error, indictment and other papers constituting the record have not even yet been sent to the Circuit Court of Appeals. Accordingly, the only "record" which petitioner can bring to this Court on this petition consists of the motions and affidavits filed by the parties in the Circuit Court of Appeals and the rulings of that court thereon. But petitioner has sworn to this petition (p. 35, *post*) and the truth of the statements made herein as to what is

Convinced that no agreement as to a condensed and narrative bill of exceptions could be reached with Government counsel within the remaining time, petitioner applied for a further extension of time for the settlement of the bill; and Judge Patterson, who as trial judge was familiar with all the circumstances and was best able to judge what the interest of justice required, allowed a further extension of two months on October 20, 1936 (R. 21, 17 and see R. 29-30). At the hearing on this application, Government counsel stated affirmatively that they did not oppose the relief sought, but would not formally consent since they deemed the trial judge to be without power under C. A. R. IX, par. 1,[6] to grant extensions except on order made within thirty days of the taking of the appeal.

Since this view as to the meaning of that provision of Rule IX is supported by the weight of authority [7] (although

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revealed by the record before the District Court, and as to the actual course of procedure herein, is not open to dispute. In like circumstances this Court has received affidavits *dehors* the certified "record." See *Taylor* v. *U. S.*, 286 U. S. 1, 4. In any event, sufficient appears in this case upon the face of the certified record to justify review and reversal.

[6] "In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice."

[7] *Yep* v. *U. S.*, 81 F. (2d) 637, 638 (C. C. A. 10); *Gallagher* v. *U. S.*, 82 F. (2d) 721, 722 (C. C. A. 8). In both of these cases, however, the Circuit Court of Appeals nevertheless considered the merits of assignments of errors based upon the evidence, and in the *Gallagher* case there was an additional circumstance that the further extension was granted, not only after the expiration of the original thirty day period, but after the expiration of the prior extension. *Cf. Welpa* v. *U. S.*, 84 F. (2d) 829, 831 (C. C. A. 8), and see dissenting opinion of Circuit Judge Woodrough at pp. 831-833.

there is a conflict of Circuit Court of Appeals decisions upon the point[7a]) petitioner did not deem it safe to rely wholly upon Judge Patterson's further extension order. Aware that the Circuit Court of Appeals for the Second Circuit had previously decided that Rule IX of the C. A. R. gives an individual judge of the Circuit Court of Appeals acting *ex parte* no power to grant additional extensions of time to settle bills of exceptions,[8] and that this Court had refused to review that ruling on certiorari,[9] petitioner applied for relief, not to an individual judge of the Circuit Court of Appeals, but to that court as a whole (R. 22). The theory was, that, under Rule IV of the C. A. R. entitled "*Control by Appellate Court,*" supervision and control of the appellate proceedings, "including the proceedings relating to the preparation of the record," had vested in the Circuit Court of Appeals as of the date of the filing of the duplicate notice of appeal in that court,[10] and that

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[7a] The Government's view has been adopted by the Eighth and Tenth Circuit Courts of Appeals (see footnote 7, *supra*) and by the Second Circuit Court of Appeals in the instant case. But the Third Circuit Court of Appeals in *Fierman* v. *United States*, 84 F. (2d) 968, holds that the rule permits the trial judge to grant an additional extension after the expiration of the thirty days provided it is granted within the period of the first extension, but that additional extensions are not authorized where granted after the expiration of the period of the prior extension.

[8] *U. S.* v. *Adamowicz*, 82 F. (2d) 288, at least when not assigned to sit in the District Court in the absence, disability or death of the trial judge, Rule XIII, C. A. R.

[9] 80 L. Ed. 747.

[10] Paragraphs 1 and 2 of Rule IV, C. A. R. provide:

"The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal."

Notices of appeal were filed by this petitioner in the trial court on June 30, 1936 (R. 6) in compliance with paragraph 3 of Rule III, C. A. R.,

under that rule the Circuit Court of Appeals had specific authority to "modify any order made by the trial judge or by any judge in relation to the prosecution of the appeal * * *"[11]

This is a new point, which has not, so far as counsel have been able to ascertain, been presented or decided in any previous case. It is submitted that petitioner's view as to the power of the Circuit Court of Appeals, acting as a court under Rule IV, is not only in accord with the express language of the rule, but is consistent with the dominant theory of the C. A. R. as a whole to eschew labored detail but to vest immediate control of the whole appeal, "including the proceedings relating to the preparation of the record on appeal," in the Circuit Court of Appeals so that that court may modify, either by shortening or enlarging, periods of time for the preparation of the record granted by the trial judge, or make such other procedural orders as are appropriate in the circumstances of the particular case, and such as may be conducive of the due administration of justice with all deliberate speed.

The application for relief under Rule IV was heard by the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ.), through the medium of a bi-party argument on Oc-

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but the trial court clerk did not file the duplicate notice with the clerk of the Circuit Court of Appeals until August 9, 1936. (See endorsements R. 10). While the control of the appeal vested in the appellate court as of the latter date and, therefore, existed at the time (October 20-27, 1936) of the application for relief to the appellate court referred to in the text above, the delay by the trial court clerk of forty days in filing the notice of appeal can scarcely be squared with the requirement of Rule IV that he shall file it "immediately"; and this is but one of a number of instances of practical disregard of the C. A. R. exhibited by this case.

[11] Paragraph 3 of Rule IV, C. A. R. provides:

"The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court, or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

tober 27, 1936 (R. 22), and the view as to the scope of the power of that court under Rule IV as above set forth was specifically pressed upon the court (R. 22).

While the Circuit Court of Appeals rendered no written opinion upon this application, the judges present at the hearing then indicated (a) that they doubted the power of the trial judge to grant a further extension; (b) that they did not regard Rule IV as giving the Circuit Court of Appeals the power suggested; but (c) they unanimously suggested, as a compromise measure, that in the circumstances of this case, and in order to avoid any jurisdictional question, an application should be made to the trial judge for an order settling the stenographer's verbatim transcript as the bill of exceptions, and that thereafter an application might be made to the Circuit Court of Appeals for time to prepare, agree upon and print a condensed and narrative record under Rule IX, par. 4, C. A. R. (R. 23). This rule provides that after the bill of exceptions has been settled and the record on appeal filed with the clerk of the Circuit Court of Appeals:

> "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or *reduction* of the record filed with the appellate court, and may issue such directions to the trial court or trial judge, in relation thereto, as may be appropriate." [Emphasis added.]

As appears by the uncontradicted affidavit of this petitioner in the record now before this Court (R. 23), the following occurred in connection with the hearing of the application discussed immediately above:

> "Judge Hand, at this time stated in substance, 'I do not believe that you will oppose such an application, Mr. Brower.' Mr. Brower stated that he might oppose this application. Whereupon, Judge Hand said in substance, 'I think that upon reconsideration, you will

withdraw your opposition.' And Judge Manton said in substance, 'That is the direction of this court.' "

On the following day petitioner applied to Judge Patterson to settle the stenographer's minutes as the bill of exceptions; and this motion was opposed by Government counsel upon the ground that the trial judge was without power to do so since the requirements as to condensation and narration had not been complied with (R. 23). Judge Patterson at first granted the motion and signed an order settling the bill of exceptions in the form presented, but shortly thereafter struck his signature and denied the motion (R. 24). Petitioner immediately applied to the Senior Circuit Judge, who agreed to convene the Circuit Court of Appeals to hear an application for mandamus or other relief; but before this proceeding had been consummated, a conference was held with Judge Patterson and Government counsel in the chambers of the Senior Circuit Judge at which Judge Patterson suggested that petitioner strike the colloquy of counsel from the stenographer's minutes, thus accomplishing a condensation, and appear before him on the following Monday, November 2, for settlement of the bill (R. 24). This was done and the minutes again presented for settlement on Monday, November 2. Judge Patterson at first refused to settle the bill, on the Government's suggestion that it was presented out of time and that he was without power to do so; but, later on the same day, being convinced that Sundays are excluded from the count under the C. A. R., he signed an order settling the stenographer's minutes, as condensed, as constituting the bill of exceptions (R. 25).

As appears by the uncontradicted affidavit of this petitioner in the record before this Court, "Judge Patterson stated that error might have been committed and that he did not wish to deprive your petitioner of his appeal" (R. 25).

On the same day, November 2, 1936, the settled bill of exceptions and assignment of errors were filed with the clerk of the trial court (R. 25), in compliance with paragraph 1 of Rule IX, C. A. R. It thereupon became the mandatory duty of the clerk of the trial court to send the record, including the bill of exceptions and assignment of errors to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX, C. A. R., which reads as follows:

> "Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal."

The clerk of the trial court has never taken any steps whatever to comply with this rule, and, according to the best information that this petitioner can obtain, does not intend to do so (see affidavit of Silberman, *post*, pp. 37-39). The result is that the record has never been transmitted to the Circuit Court of Appeals. On November 4, desiring to withdraw the bill of exceptions from the office of the clerk of the Circuit Court of Appeals in order to finish the narrative thereof for the use of that court pursuant to the procedure previously suggested by the Circuit Court of Appeals, petitioner secured an order from the Senior Circuit Judge dated November 5, 1936, directed to the clerk of the Circuit Court of Appeals to permit petitioner to withdraw the bill of exceptions from the clerk's office for that purpose (see affidavit of Silberman, *post*, p. 37). It was then discovered that neither the bill of exceptions nor any other part of the record had been transmitted to the Circuit Court of Appeals by the District Court clerk. Whereupon, petitioner and his assistants appeared in the office of the clerk of the trial court and demanded that the bill of ex-

ceptions and the rest of the record be sent to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX. The clerk of the trial court said that he had never heard of any such practice, and that such procedure is never followed in his office, but that the appellant was required to make deposit for printing with the trial court clerk and have the record printed by him before it was sent to the Circuit Court of Appeals; and that this old practice which formerly obtained was still followed by his office, the C. A. R. to the contrary notwithstanding (affidavit of Silberman, *post*, pp. 37-39).

Such a procedure, besides being in flat disregard of the express mandate of paragraph 3 of Rule IX, frustrates the whole purpose of the C. A. R. in providing for the vesting of immediate control of the appellate proceedings in the appellate court and the prompt transmittal of the record to that court before printing. Petitioner conceives that it was one of the objects of the C. A. R. that the appellate court might hear the appeal without printing, or might, after the record reached it, provide for expeditious hearing in such manner and upon such conditions as it might determine to be appropriate to the particular case. This whole plan is frustrated by the practice being followed by the District Court clerk.

Moreover, it is productive of precisely the sort of delay in the hearing of appeals as the new rules were intended to prevent, in that appellants, like this petitioner, who will have substantial difficulty in financing the printing of these enormous criminal records, are deprived of any opportunity to get the record before the appellate court unless and until they have raised the requisite sums demanded by the clerk of the trial court. There is no statutory or other warrant in law for the practice observed by the clerk

of the trial court in this respect, and it is in the public interest that this procedure be disapproved by this court.[12]

Meanwhile, and on November 16, 1936, Government counsel secured from the clerk of the trial court certified copy of the docket entries in the case and certificate that appeal had been allowed (R. 1-6; 12), and moved the Circuit Court of Appeals to docket and dismiss the appeal under Rule XIV of the Circuit Court of Appeals [13] upon the ground that petitioner had failed to docket the case in the Circuit Court of Appeals in time, and because the bill of exceptions was not settled in compliance with Rule IX, C. A. R. (R. 11). The affidavit of Government counsel in support of the motion to docket and dismiss raised both the contention that the bill of exceptions was ineffective because not in condensed and narrative form, and that it had been allowed and settled out of time (R. 14). By opposing affidavit your petitioner called attention of the Circuit Court of Appeals to the facts of which it was already aware, and which have been detailed above, including the fact that the

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[12] The matters stated in this and the two preceding paragraphs are not of record but appear by the affidavit of Richard E. Silberman annexed to and made a part of this petition for certiorari. For precedent for affidavits *de novo* in this court upon such points, see *Taylor* v. *U. S.*, 286 U. S. 1, and note 5, *ante*. While the trial court clerk has never yet taken any steps to comply with paragraph 3 of Rule IX and has not sent the record or any part of it to the Circuit Court of Appeals, your petitioner, after great difficulty, was able to persuade an assistant clerk of the trial court, upon the authority of the Senior Circuit Judge's order above referred to, to release the bill of exceptions to the petitioner so that he might continue his efforts to narrate and condense it for the use of the Circuit Court of Appeals in accordance with the suggestion made by that court as above adverted to. See affidavit of Silberman, pp. 37-39 *post*.

[13] Reading (so far as is pertinent) as follows:

"In criminal cases it shall be the duty of the appellant to docket the case and file the record within the time fixed by Rules VIII and IX of the Rules of the Supreme Court in criminal cases. If the appellant shall fail to comply with this rule, the appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed."

procedure which the petitioner had followed with respect to the bill of exceptions was that suggested by the Circuit Court of Appeals itself (R. 16-18).

On December 4, 1936, the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ.) entered an order dismissing the appeal "for lack of jurisdiction" (R. 18). No opinion was delivered in connection with this order.

On December 9, and well within the time allowed by the Circuit Court of Appeals Rules (Rule XXVI, C. C. A.), petitioner filed an application for a rehearing (R. 19-27), duly sworn to by himself (R. 28) and by Messrs. Silberman & Stern (R. 27-28), who are the two members of the New Jersey bar who had been assisting him, and who were aware of the facts and proceedings as stated herein. This petition recited these facts and proceedings at length; renewed the arguments for the construction of the C. A. R. previously advanced; specifically requested the Circuit Court of Appeals to exercise its discretionary power under the C. A. R. to accord petitioner relief; asserted that failure so to do would constitute an abuse of discretion; and prayed that, at the least, the Circuit Court of Appeals should indicate the ground of its decision in order that review in this Court might be had (R. 27).

The facts stated in this petition for rehearing with respect to the proceedings (as hereinbefore detailed) were not controverted by the Government nor questioned by the Circuit Court of Appeals in its subsequent opinion or otherwise.

The Circuit Court of Appeals held the application for about two weeks, and on December 22 announced its *per curiam* opinion (R. 29-31) and its order (R. 32). The opinion recites the case was pending on "motions for reargument of motions to correct the record; also to dismiss the appeal" (R. 29), and it concludes, "The motion to amend the record is denied and the motion to dismiss the appeal

is granted." The order recites the denial of a motion "for a reargument of the motions to correct the record and dismiss the appeal" (R. 32). As a matter of fact, there was never any motion to amend or correct the record. There was never any question as to the accuracy of the record, nor any attempt to correct it. What your petitioner had urged in opposition to the motion to docket and dismiss and in support of the petition for rehearing was that the Circuit Court of Appeals, among other courses, has authority under paragraph 4 of Rule IX, C. A. R., to direct a "*reduction* of the record" to condensed and narrative form in order to comply with the requirements, and that it can do that either by remitting the record to the trial court, or by letting the record, including the bill of exceptions as settled, stand as and when filed in the Circuit Court of Appeals, but having the work of completing the narrative condensed version of that bill done by counsel in the Circuit Court of Appeals, and the case argued on the basis of that condensed narration.

The opinion of the Circuit Court of Appeals upon the petition for rehearing did, however, accede to the request of petitioner for a statement of the grounds of decision. The opinion makes the following rulings:

(1) that the trial judge had no power to grant an additional extension of time after the thirty-day period had elapsed (R. 30);

(2) that the Circuit Court of Appeals had no power to grant such an extension (R. 30)—even on a motion under Rule IV, C. A. R., par. 5, to modify an extension order granted by the trial judge within the thirty-day period.

(3) that in view of the exclusion of Sundays and holidays in computing the time under the C. A. R. (Rule XIII, C. A. R.), the settlement of the bill of exceptions on Mon-

day, November 2, was timely and was within the period of the initial extension (R. 30);

(4) but that the appeal must be dismissed because the assignment of errors included a contention of lack of evidence to support the indictment, and this required an examination of all the evidence, and that since the bill of exceptions was not in condensed and narrative form, it was insufficient (R. 31). In making this ruling, the Circuit Court of Appeals took no exception to the accuracy, inclusiveness or timeliness of the settlement of the bill of exceptions, but placed its ruling squarely and solely on the ground that it was not in narrative and condensed form. It may be noted, in addition, that due to the disregard of rules by the trial court clerk the assignment of errors were not before the Circuit Court of Appeals and that court had no means of knowing, and apparently did not inquire, whether there were any assignments going to errors on the record proper which would require consideration even in the absence of a bill of exceptions. While petitioner does not suggest that such was the fact, yet the point is mentioned here to indicate the dangers which inhere in the disregard of orderly procedure;

(5) that the Circuit Court of Appeals could not remit the record to the District Court to permit the narration and condensation to be accomplished, because the time for the settlement of the bill of exceptions had expired; and that in this aspect the time limitation provisions of Rule IX, C. A. R. must be regarded as making the rule of *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, inapplicable in criminal cases (R. 31);

(6) that the provisions of Rule IX, C. A. R. authorizing the Circuit Court of Appeals to entertain a motion by either party for the correction, amplification or reduction of the record filed with the appellate court or to issue directions

to the trial court in relation thereto do not authorize the Circuit Court of Appeals to do so with reference to the bill of exceptions. The theory of the Circuit Court of Appeals was that that would amount to a correction or change in the bill of exceptions, that the trial court was without power to do so since the time had expired, and that the Circuit Court of Appeals was without power to do so because it was not its own record and it was, therefore, incompetent to "correct or change it" (R. 31). It will be noted that the Circuit Court of Appeals passes over in silence the fact that at the hearing of the previous motion for relief before the settlement of the bill of exceptions, the same Circuit Court of Appeals judges had unanimously suggested to this petitioner that the verbatim transcript be settled as the bill of exceptions, and that the narration and condensation could thereafter be done in the Circuit Court of Appeals under Rule IX (see R. 22-23). Indeed, the undisputed affidavit of this petitioner in the record before this Court discloses that the court did not limit itself to suggestion, but in effect *directed* the procedure which was ultimately followed (R. 23). It may also be noted that the Circuit Court of Appeals in its final opinion does not adopt the view apparently entertained by a majority of the judges at the argument of the motion to docket and dismiss, i. e., that a bill of exceptions otherwise unobjectionable, but not in narrated and condensed form, is a nullity, and that, therefore, there was no evidence whatever before the Circuit Court of Appeals upon which it could take any action at all. Such a view is obviously indefensible under the authorities.[14] In the reasons relied upon for the allowance of the writ in this petition (*post*, pp. 16, *et seq.*), petitioner will show that the

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[14] *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U. S. 305, 308;
Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 387;
Alexander v. *Cosden Pipe Line Co.*, 290 U. S. 484, 490, 491.

substituted grounds of decision ultimately relied upon by the Circuit Court of Appeals are equally indefensible;

(7) after placing its decision squarely upon grounds of lack of jurisdiction and power, the Circuit Court of Appeals added briefly at the end of its opinion: "The appellant had four months and has offered insufficient excuses for his delinquency" (R. 31).

Reasons Relied Upon for the Allowance of the Writ.

This case discloses a lamentable succession of material errors by the court below, as well as by the clerk of the United States District Court. It is patent that the C. A. R. are not undersood in the Second Circuit; that the very court (the Circuit Court of Appeals) to which the theory of those rules intends to give a broad discretionary authority, fails to appreciate the plan upon which the rules are drawn; that this lack of understanding has contributed to the erroneous and restrictive construction by it of particular provisions of those rules intended to grant it broad power; and that the trial court clerk in that Circuit (at least in the Southern District of New York) is consistently following a procedure flatly in the face of a specific provision of those rules and one calculated to destroy one of the primary advantages which the rules sought to make effective.

It is of obvious public importance that misconstruction and misunderstanding of the C. A. R. by the courts primarily charged with their enforcement be promptly corrected (points 2 and 3, *post*), especially upon points as to which there is conflict of view (point 2, *post*) and that consistent disregard of the plain mandate of these rules by the clerks of the District Courts be ended (point 1, *post*).

In addition, the result is tragically unjust to the petitioner—depriving him of an appeal allowed him by the statute which he has bent every effort to perfect, and which

presents substantial questions as to the lawfulness of his conviction (point 5, *post*).

Finally, if the ruling of the Circuit Court of Appeals can in any just sense be regarded as a mere discretionary refusal to accord relief within its power to grant, then this is a patent case of an abuse of such discretion (point 4, *post*).

These points, relied upon as grounds for the granting of the writ, are briefly developed below:

1. *The result of the failure of the District Court clerk to send up the record in compliance with the rule and the error of the Circuit Court of Appeals in considering the application to docket and dismiss in the absence of the record.*

While the errors referred to under this heading may not be of primary importance to the determination of this particular case (if the Circuit Court of Appeals is right in its ultimate determination that the bill of exceptions is fatally defective and that there is no authority to remedy the situation), the petitioner cannot afford by silence to be put in the position of acquiescing in erroneous procedure. Accordingly, the point is now specifically made that the trial court clerk, despite the mandate of C. A. R. IX, par. 3, failed and refused to certify the record including the bill of exceptions and assignment of errors to the Circuit Court of Appeals and still fails and refuses to do so; that the Circuit Court of Appeals, being vested with full control of the situation by C. A. R. IV and IX, should have corrected this disregard of law; and that it was prejudicial and reversible error for the Circuit Court of Appeals, in the circumstances, to consider and determine the appeal upon a motion to docket and dismiss without requiring the clerk of the trial court to obey the law and send up the record.

While a reversal of the decision below in this case upon these narrow procedural grounds alone would not be adequate in the circumstances, the consequence of continued adherence to improper practice in the Second Circuit may be most serious, and it is respectfully suggested that this opportunity should be taken to disapprove the disregard of orderly and plainly prescribed procedure which is exhibited in this case.

If the clerks of Federal District Courts in criminal cases, following a practice antedating the promulgation of the C. A. R. and doubtless proper enough in civil cases, can continue to refuse to send up records in criminal cases as soon as the bill of exceptions is settled and filed with the assignment of errors, and can continue to require that the convicted defendant shall first raise the money and cause the record to be printed before the record can get to the appellate court, the very delays that it was the purpose of the C. A. R. to avert will be intensified. The obvious purpose of the rules in putting the question of prompt hearing of the appeal, whether on a printed or an unprinted record, in the control of the appellate court, will be defeated.

It was also improper for the Circuit Court of Appeals to entertain and determine the appeal upon a motion to docket and dismiss in the absence of the record, and in the face of the disregard of the rule by the trial court clerk. Under the rule of the Circuit Court of Appeals (Rule XIV) as under the rule of this Court (Supreme Court Rule 11, par. 1), a motion to docket and dismiss lies only where the appellant is in default of docketing the case within the time allowed. In all cases not covered by the C. A. R. the case must be docketed in the appellate court before the return day, and that return day is the date named in the citation. But in criminal cases the citation has been abolished (C. A. R. III, par. 2); there is no return day; and Rule VIII, C. A. R., in cases appealed on the record proper, and

Rule IX, C. A. R. in cases appealed on bills of exceptions, take away from the appellant the duty of getting the record from the trial court to the appellant court and place it solely on the clerk of the trial court. This is not understood and is not being obeyed. How is it possible under these Criminal Appeals Rules for the appellant to be in default in respect of an act which it is no longer his duty to perform?

It may be suggested that while the motion of the Government counsel to the Circuit Court of Appeals was in the technical form of a motion to docket and dismiss, it was competent for the Circuit Court of Appeals to regard it as a motion filed under par. 3 of Rule IV, C. A. R. to dismiss the appeal because of jurisdictional defects.[15]

Assuming *arguendo* that it is competent for the Circuit Court of Appeals to entertain such a motion before the record has been sent to it or even before the record has been prepared, yet it is clearly an abuse of discretion for that court to entertain such a motion in the absence of such a vital paper as the assignment of errors. The "record" which was before the Circuit Court of Appeals contained no copy of the assignment of errors, and, for all that the Circuit Court of Appeals knows from its records, this case may involve important questions arising on the face of the record proper and having nothing to do with the bill of exceptions.[16] And yet the whole appeal has been dismissed for supposed fatal defect in the bill of exceptions.

In brief, then, as to this part of the case, the Circuit Court of Appeals erred (a) in disregarding the breach of

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[15] "The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

[16] The first of the preliminary "grounds of appeal" (C. A. R. III, par. 3) goes to error on the record proper (R. 9).

rules by the trial court clerk; (b) in entertaining a motion to docket and dismiss for default of appellant when the matter as to which default was claimed is the duty of the trial court clerk and not of the appellant, under the Criminal Appeals Rules; and finally (c), if the Government's motion to docket and dismiss be regarded as a motion to dismiss the appeal for jurisdiction defects pursuant to authority conferred upon the Circuit Court of Appeals by par. 3 of C. A. R. IV, then it was error for the Circuit Court of Appeals to entertain and determine the motion without adequately informing itself of the record and the issues.

These matters, while not dispositive of the case, evidence departures from orderly procedure which should not be overlooked.

2. *The ruling as to the lack of the power of the trial judge or of the Circuit Court of Appeals to grant additional time for the settlement of the bill of exceptions or to modify the original order of extension.*

The Circuit Court of Appeals here ruled that the trial judge has no power to grant a further extension of time for the settling and filing of the bill of exceptions except upon an order entered within thirty days after the taking of the appeal (R. 30). This is supported by decisions in the Eighth and Tenth Circuits which constitute the weight of authority.[17] This view, however, is directly in conflict with that of the Circuit Court of Appeals for the Third Circuit announced in *Fierman* v. *United States,* 84 F. (2d) 968, where it was ruled that a further extension of time for filing the record and assignment of errors was not within the authority of the trial judge when made after the expiration of a prior order of extension, but where it was also ex-

[17] *Yep.* v. *U. S.*, 81 F. (2d) 687, 689 (C. C. A. 10); *Gallagher* v. *U. S.*, 82 F. (2d) 721, 722 (C. C. A. 8). *Cf. Wolpa* v. *U. S.*, 84 F. (2d) 829, 831 (C. C. A. 8).

pressly ruled that further extensions are authorized by C. A. R. IX when, as in the present case, granted within the period of a prior timely extension.

This conflict of view upon this important question should be settled by this Court.

With respect to the power of the Circuit Court of Appeals to modify the trial judge's timely order of extension by extending the length of the extension, this case presents a novel question not heretofore raised in any case so far as petitioner has been able to ascertain, and it is urged that the ruling of the Circuit Court of Appeals upon this point is plainly at war with the express terms of C. A. R. IV and with the plan of the Rules as a whole. As previously pointed out, that rule vests supervision and control of the appeal in the Circuit Court of Appeals from the date of the filing with its clerk of the duplicate notice of appeal which, in this case, occurred on August 9, 1936. That supervision and control extends to and includes "the proceedings relating to the preparation of the record on appeal" (C. A. R. IV, par. 2); and that supervision and control is expressly defined to include the power to "modify any order made by the trial court or by any judge in relation to the prosecution of the appeal." Petitioner is unable to see how this intentionally broad language can be squared with the view that it does not lodge power anywhere to modify an order of the trial judge with relation to settling and filing a bill of exceptions. It is precisely the bill of exceptions situation which is likely to be productive of the most difficulty, and in respect of which it is most essential that there be a discretionary power somewhere to take consideration of the circumstances of particular cases. If it is to be supposed that busy trial judges may be disposed to be lenient or may be too busy to inquire into the situation, it may be proper to refuse them power to grant more than the one extension, but this Court does not have to be re-

minded that it is beyond the power of any defendant by any act of his alone to procure the settlement of the bill of exceptions within any stated time. He can only do so with the concurrence of the trial judge, and, as a practical matter, it is essential for him also to secure the concurrence and the active cooperation of opposing Government counsel who may, whether or not properly, have a hostile attitude. The difficulties in securing this cooperation and concurrence are intensified in bitterly fought cases such as the present one, and where the evidence upon material and vital issues is wholly circumstantial, thus adding to the difficulty of any agreement as to narration or condensation.

This case does not involve the mere question whether under all the circumstances of this case the Circuit Court of Appeals should in its discretion have exercised its power of modification under par. 3 of C. A. R. IV. In this case, the Circuit Court of Appeals has denied its power. It has used terms broad enough to deny the possession of any power to modify an order as to the time for settling a bill of exceptions, whether the modification sought be on application of the Government seeking to reduce the time fixed by the trial judge, or on application by the defendant seeking to increase it. What the Circuit Court of Appeals has done is to carve the bill of exceptions settlement situation out of the rule, or, stated another way, to read into Rule IV, par. 3, an exception denying its power when the modification sought is one relating to the time for the settlement of the bill. We are unable to see any justification for that view. There is no recorded authority in support of it. *United States* v. *Adamowicz*, 82 F. (2d) 288, cert. den. 80 L. Ed. 747, cited by the Circuit Court of Appeals, is not in point because the further extensions in that case were not sought by an application to the Circuit Court of Appeals to modify the trial court's order, but by *ex parte* applica-

tion in chambers to an individual judge of the Circuit Court of Appeals to grant additional extensions.

The opinion of the Circuit Court of Appeals upon this point gives no reason for its ruling (R. 30). It is supported neither by authority nor by the text of the rule which the Circuit Court of Appeals was purporting to construe. The matter is one of general importance and first impression, and deserves the consideration of this Court.[18]

3. *The major error of the Circuit Court of Appeals in ruling that the appeal must be dismissed because the bill of exceptions was not in narrated and condensed form, and in ruling that it lacked any power to permit or direct a procedure to cure the difficulty.*

The Circuit Court of Appeals has flatly ruled in this case that where a bill of exceptions contains all the evidence set out verbatim; and where the only attempt at condensation consists of striking out colloquy of counsel; and where the bill is signed and settled within time by the trial judge pursuant to what amounted to a direction by the appellate

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[18] If it is objected that petitioner should have sought review in this Court on this point on October 27 when the Circuit Court of Appeals initially though informally ruled that Rule IV was not broad enough to permit it to make the modification suggested, and when the Circuit Court of Appeals suggested, and in fact directed, the alternative procedure that was in fact followed (R. 23), the answer is that this petitioner was not required to seek review in this Court until he had exhausted all means of relief in the Circuit Court of Appeals and secured a final adjudication from that court. It is well settled in this Court that a failure to seek review of an interlocutory ruling of the Circuit Court of Appeals is not laches (*Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 91), and that on certiorari to review a final decision of a Circuit Court of Appeals this Court may notice and rectify errors that may have occurred in interlocutory proceedings in the Circuit Court of Appeals (*Hamilton Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258, 259; *Toledo Scale* v. *Computing Scale Co.*, 261 U. S. 399, 418; *Panama Railway Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284). Moreover, the Circuit Court of Appeals noticed and decided this point in its opinion upon its final decision (R. 30).

court; and when there is no question as to the accuracy or sufficiency of the bill,—nevertheless, there is a failure to comply with the rules as to condensation and narration, which is jurisdictional and requires the dismissal of the appeal; and that the Circuit Court of Appeals has no jurisdiction or power to do anything to alleviate the situation.

This is certainly unjust in this particular case. It is also clearly out of line with the views as to the effect of the narration and condensation rule which prevailed in the opinions of this Court prior to the C. A. R. It is a novel and startling ruling on a matter of general importance and deserves review.

As previously indicated (*ante*, p. 15), the majority of the Circuit Court of Appeals was at first disposed to the view that when a bill of exceptions, although in all other respects complying with the rules, was not narrated and condensed, it was a nullity and there was nothing anybody could do about it. This is plainly untenable. The settled rule which obtained both at law [19] and in equity [20] prior to the promulgation of the C. A. R., was that the penalty for failure to observe the requirements as to narration and condensation of evidence in the bill of exceptions or statement of evidence lay in the discretion of the appellate court, and should be made to fit the circumstances of the particular case. It was settled that for such failure the appellate court might dismiss the appeal; [21] might decline to consider assignment of errors based upon the evidence; [22] might consider and decide the questions arising on the record proper only; [23] or might remit the transcript to the trial court for compliance

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[19] *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 490.

[20] See cases in four following notes.

[21] *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 173, 174.

[22] *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318, 325.

[23] *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U. S. 305, 308.

with the rule,[24] and assess damages and costs against the offending party.[24a] And this Court had also ruled that there might be cases in which the appellee would be estopped to complain of failure to observe the rule respecting condensation and narrative.[25]

By the instant opinion, the Circuit Court of Appeals has announced a new doctrine, to the effect that the C. A. R. have changed the penalty from one resting in the discretion of the court, to an absolute bar to an appeal. Specifically, it has now been ruled by the court below that the power exercised in the *Barber Asphalt* and *Fairbanks, Morse* cases by this Court no longer exists in respect of criminal cases. It is said that the record cannot be remitted by the appellate court to the trial court for narration and condensation of the bill of exceptions for the reason that C. A. R. IX now imposes a time limit for the settlement of the bill, which cannot be enlarged.

The fault in this reasoning lies in the assumption that prior to the C. A. R. there was no time limit for the settlement of the bill of exceptions. But there was a very definite time limit,—the settled rule being that the power of the trial judge to allow and settle a bill of exceptions ended with the end of the term of court at which the judgment was rendered, except as that term had been extended for that purpose by standing rule, by special order, or by consent of the parties.[26] It is true that such definite limits are not observed in equity cases (*Barber Asphalt Paving Co.* v.

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[24] *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U. S. 305, 308; *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 387.

[24a] *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, *id.*

[25] *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 490, 491.

[26] *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 298; *Muller* v. *Ehlers*, 91 U. S. 249, 250; *Reporters* v. *Butterworth-Judson Co.*, 258 U. S. 365, 368, 369; *Jennings* v. *Railway Co.*, 218 U. S. 255, 257, 258.

Standard Asphalt & Rubber Co., 275 U. S. 372, 385); but it can scarcely be asserted that this affords rational ground (in the absence of statutory command) why failure of compliance with identical narration requirements is to be regarded as fatal at law but excusable in equity. In the *Barber Asphalt* and *Fairbanks, Morse* cases, this Court directed the remitting of the transcript to the trial court for compliance with the rule as to condensation and narration long after the ending of the term. There is no valid reason why this is not also good procedure at law, whether in civil or criminal cases. The force of Rule IX, C. A. R. is expended by changing the initial time limit from the end of the term to a specific period of thirty days after the taking of the appeal, with provision for extension by the judge. There is nothing in the language of that rule, or in the C. A. R. as a whole, which justifies the assumption that this Court intended, in respect of criminal cases, to abrogate the doctrine of *Fairbanks, Morse* and *Barber Asphalt*, and to tie the hands of the appellate court whatever the exigencies of the situation might be.

The exigencies of this particular case were such as to call for the exercise of remedial power by the appellate court. The trial judge, familiar with the circumstances, in effect so ruled in allowing the additional extension of time which the Circuit Court of Appeals held to be futile. The Circuit Court of Appeals had itself initially recognized that the situation called for an enlightened and flexible use of the new C. A. R. when it found, suggested, and in effect directed, the procedure which it initially thought would avoid the net of procedural difficulties which have robbed this petitioner of his appeal. And the Circuit Court of Appeals, in its final opinion on rehearing—notwithstanding its closing remark as to the time which petitioner had had—felt bound to place its decision upon the ground of lack of jurisdiction and want of power.

We do not believe that the C. A. R. were intended to rob the appellate court of power in appropriate cases to remit the transcript to the trial court for the purpose of narration and condensation of the evidence, although the time for the settling of the bill had expired. On the contrary, we believe that the new rules provide an additional and a more speedy and flexible procedure even than that, if the Circuit Court of Appeals deems the particular case to justify its use. Under par. 4 of Rule IX, C. A. R., the Circuit Court of Appeals is expressly given power to order a "reduction of the record filed with the appellate court." It may or may not accomplish that by directions to the trial court. The rule is clearly broad enough to authorize the Circuit Court of Appeals, where a bill of exceptions has been filed containing all the evidence verbatim and as to the accuracy of which there is no question, to direct the parties within such time as that court deems proper to file a condensation and narrative of it for use at the hearing of the appeal. We cannot understand how such an order can be regarded, as the Circuit Court of Appeals regarded it, as amounting to a "correction" or "change" (R. 31) of the bill of exceptions. To supply a narrative form version of an existing and settled bill of exceptions is but to comply with a rule of form and procedure which, after all, is primarily for the benefit of the appellate court itself.

Of course, the C. A. R. are not to be construed as permitting the narration and condensation of evidence to be disregarded as a matter of practice in all cases, with the idea that this can always be attended to later on in the Circuit Court of Appeals. No such result followed the decisions in the *Barber Asphalt* and *Fairbanks, Morse* cases; nor is it to be apprehended from a proper construction of the Criminal Appeals Rules.

Flexibility, with control in the appellate court, is the keynote in the new rules. The rigid rule advocated by the

Circuit Court of Appeals in this case will serve to defeat its own purpose. If the bar and Federal trial judges are told that once a date for settling a bill of exceptions has been set by the trial judge it is irrevocable, the tendency is going to be for counsel to insist upon, and for trial judges (who know the difficulty which always attends the narration and settlement of the bill of exceptions) to grant, disproportionately long extensions of time in the first place. This will contribute to delay in a greater percentage of cases than would be the fact if the appellate court has the discretionary power to fit the time to the exigencies of the particular case, as they in fact develop.

A further result of the rigid rule advocated by the Circuit Court of Appeals would be that if the trial judges do start granting inordinately long periods initially for the settlement of bills, the Circuit Court of Appeals will be powerless to do anything about it, because the Circuit Court of Appeals has ruled in this case that its power to modify orders of the trial court with relation to appeals does not extend to orders concerning bills of exceptions (see point 2, *ante*).

These considerations, we submit, establish that the question under this heading is no minor technicality but is a matter of major concern. The ruling below on this point is without any reported authority to support it; is not supported by, but, we submit, is in conflict with, the express language as well as the general purport of the C. A. R.; and, in addition to the novelty and importance of the question, this decision is the first one holding that a rule of procedure sanctioned by this Court in at least three previous cases has been overruled *sub silencio* and by inference by language of the C. A. R. which we submit was never intended to have any such effect.

4. The ruling of the Circuit Court of Appeals dismissing the appeal for want of narration and condensation of the bill of exceptions constitutes an abuse of discretion.

For reasons already stated, petitioner does not believe that the opinion below can be regarded as basing the order of dismissal upon a ruling that he had shown no grounds for relief in respect of the bill of exceptions, the question of power aside. At the best, the opinion below must be regarded as based both upon the ruling of lack of power and upon the ruling as to discretion, and we submit, without further argument, that if the Circuit Court of Appeals had deemed itself possessed of the power to correct the situation and hear the appeal on the merits, this Court cannot say from the record before it that it would have refused relief upon discretionary grounds.

But if the decision below were to be regarded as a discretionary refusal to accord relief within the power of the appellate court to grant, then it must be reversed because constituting a patent abuse of discretion. In *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 386, 387, the appellant had totally failed to observe the requirements respecting condensation and narration, and the Circuit Court of Appeals, which had previously consistently overlooked such failures, took notice of it in that case and dismissed the appeal. This Court held that it was within the power of the Circuit Court of Appeals to remit the transcript to the trial court so that full compliance might be had with the rule respecting condensation and narration. It further held that the Circuit Court of Appeals had abused its discretion in dismissing the appeal rather than in remitting the transcript. The abuse was said to lie in the fact that the harsh penalty of dismissal was invoked "notwithstanding the transgression was largely due to its [the Circuit Courts of Appeals'] own

course of action" in being lax in enforcement of the rule in prior cases.

This is not the *Barber Asphalt* case. We do not place our argument upon the ground that in other criminal cases the Circuit Court of Appeals has been lax in enforcing the rules as to condensation and narrative,—although we are informed that such is the fact. This case is worse than the *Barber Asphalt* case from the standpoint of abuse of discretion. Here was no mere laxity in previous cases which lulled counsel into a sense of security. Here the appellate court, when a motion for relief was made to it under Rule IV, C. A. R., affirmatively took a hand in the situation, ruled that the relief asked for was not proper, suggested that it had the very power which it now denies that it has, and directed that the precise procedure followed by this petitioner should be followed. If the Circuit Court of Appeals does have the power which it thought it had at the hearing on October 27, and which this petitioner maintains that the rules intended it to have, then we can conceive of no greater abuse of discretion than in refusing, in the circumstances of this case, to exercise it.

At the time this suggestion and direction were made by the appellate court, the petitioner had already reduced to narrative form a substantial portion of the evidence and he still had six days left before the settlement date. While it is true that the Government had not at that time agreed to any of the narrative, it cannot be assumed that if the Circuit Court of Appeals had not suggested this alternative procedure and had merely denied the relief under Rule IV that the petitioner could not have completed the narration of the remaining evidence within the time and procured the trial judge to settle it even if the Government would not agree. Moreover, as appears by the affidavit of Mr. Silberman (*post*, p. 39) it was stated to the Cir-

cuit Court of Appeals on behalf of the petitioner at the argument on October 27, that this petitioner, so far as he was concerned, could complete his narration and condensation for settlement within the time still remaining. If that procedure had been followed and the bill settled without the Government's concurrence, then the Government, if so advised, could have come into the Circuit Court of Appeals afterwards and moved on five days' notice under par. 4 of Rule IX, C. A. R. to correct or change the record. The Circuit Court of Appeals, however, suggested and "directed" that petitioner should present the stenographer's minutes for settlement as the bill of exceptions, and thereafter get together with the Government for a condensation. This procedure was put forward by the Circuit Court of Appeals "in order to avoid any jurisdictional question" (R. 23). By the suggestions and directions of the appellate court, therefore, the appellant was lulled into a situation which was far more the result of the action of the appellate court itself than in the *Barber Asphalt* case, and which had far more than the "implied sanction" of the appellate court referred to in that case.

5. *The appeal from the judgment of conviction is upon substantial and meritorious grounds.*

Petitioner is aware that if the writ of certiorari be granted this Court's review would very properly be limited to the procedural and jurisdictional matters already discussed herein. Indeed, neither the indictment, the assignment of errors, nor the bill of exceptions is before this Court, so that any discussion of the merits of the appeal with a view to their review at this time would be improper. But in order to preclude any suggestion that the appeal itself is a frivolous one taken merely for delay, petitioner deems it proper to state a few basic and indisputable facts respecting the major (although not all) of his assignment of errors,

even though he must go outside the record before this Court in order to do so.

(a) Petitioner believes that there was no evidence as a matter of law sufficient to sustain the verdict or judgment. He was Vice-President of the Westchester Title & Trust Company during the depression years 1931 and 1932, and was in charge of advertising for the Company. The indictment was for using the mails to defraud and for conspiracy so to do. The alleged fraud consisted of selling mortgage participation certificates issued by the Company to the public through the mails in 1931, and 1932 and 1933 on false representations as to their safety as an investment. Indicted and tried with petitioner were the Company itself, Stevens, its President; Kuss, its Vice-President in charge of sales; and Condit, Chairman of the Executive Committee of its Board of Directors.

The issues as to scienter and good faith were sharply fought; and the prosecutor admitted in his summation that the evidence was largely circumstantial. The jury disagreed as to Condit, resulting in a mistrial as to him; but convicted all the other defendants (R. 4, 13). Kuss received a suspended sentence with probation for the duration thereof; Stevens, one year and a day imprisonment; your petitioner, two years' imprisonment (R. 13).

In these circumstances it is impossible for any court, without examining the evidence, to dismiss as frivolous petitioner's assignment that there is no evidence sufficient in law to establish his guilty participation in a fraudulent scheme. He is given by statute a right to have a Circuit Court of Appeals pass upon that point. That it is not frivolous is further attested by the statement made by the trial judge when he signed the bill of exceptions, i. e., that error might have been committed, and that he did not want to

be responsible for depriving this petitioner of his appeal (R. 25).

(b) The closeness of the case and the sharp difference as to the sufficiency of the evidence throws into a strong light the second major assignment of error, which relates to the refusal of the court to withdraw a juror and declare a mistrial. The undisputed facts are that during the course of the trial one C. Agnes McHugh, a special attorney of the Department of Justice assigned to assist in the prosecution of this case, gave out in an interview to Scripps-Howard newspapers a statement that this petitioner had handed a note to a character witness directing him how to testify upon a major question going to the merits of the case. This interview was flatly contradictory of petitioner's evidence as to the contents of the note, which showed that it did not have the character of any instructions to the witness, but, on the contrary, asked him a question. The interview on its face constitutes a flat charge by a member of the prosecuting staff that the petitioner during the course of the trial was tampering with a witness. It is admitted of record, by stipulation, that both the United States attorney in charge of the prosecution, and the Special Assistant to the Attorney General who was also conducting it, were at the time aware of the fact of this interview. On presentation of the motion to withdraw a juror, Judge Patterson suspended the trial for half a day, and then denied the motion, with a general caution to the jury to disregard newspaper articles. In making this ruling, Judge Patterson put it of record that he was "quite sure" and that "I certainly assumed" that the McHugh interview (which appeared in a leading New York newspaper) had been read by some, if not by all, of the jurors.

Under the circumstances, the petitioner will strongly urge on his appeal that the indefensible conduct of the prosecution in making such a grave charge against this petitioner in the newspapers only, was fatal reversible error, and was not cured by merely cautioning the jury.

The reversible character of this error is especially manifest when the wholly circumstantial character of the evidence on the questions of knowledge and good faith is considered.

(c) Another prejudicial trial occurrence most seriously objected to is the summation to the jury by Special Assistant to the Attorney General Brower for the United States. Petitioner will press upon the Circuit Court of Appeals the contention that this summation was a bald appeal to passion and prejudice, in which it was insinuated that the defendants were of a privileged class upon whose behalf political influence had been exerted; in which the unfortunate circumstances of some of the alleged "victims" were harped upon; in which an article by Warden Lawes of Sing Sing Prison was quoted at length in the development of the argument that crime will never be cured until "frauds and deceptions" perpetrated by "pillars of society" by means of "acts which are criminal in nature, but legal in result," are punished with the same severity visited upon acts of those who are avowed members of the underworld; and which also referred to the pernicious activities in the accumulation of wealth by individuals who go unpunished "merely because they have influence to offset their acts."

In addition, Mr. Brower characterized the defendants as "rats", and their actions as comparable to those which resulted in the Morro Castle disaster. Although petitioner's status as an attorney was not in issue, and although it appears of record that the petitioner has not practiced his

profession since 1904, the fact that he is an attorney was made the occasion to press upon the jury the obvious fact that this gave him no license to violate the law.

The summation was also prejudicial in other respects, more particularly referred to in the assignments of error. It went outside the issues; it injected improper considerations; and, to secure a conviction, it frankly appealed to passions and prejudices, all too easily aroused in these days of depression whenever an investment dealer is on trial and workers and widows are prosecution witnesses.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the order and judgment of the said United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

REYNOLDS ROBERTSON,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Reginald P. Ray, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the petitioner in the foregoing petition named; I have read the same and am familiar with the matters stated therein. The facts, matters and things therein contained, so far as they relate to my acts, are true, and so far as they relate to acts of others, I believe them to be true.

My said petition is filed in good faith for what I verily believe to be just and legal cause, and it is not intended for the purpose of delay.

REGINALD P. RAY.

Subscribed and sworn to before me this 28th day of December, 1936.

[SEAL.] ALFRED C. SWETT,
Notary Public, New York County.

N. Y. Co. Clerk's No. 763, Reg. No. 7-S-1021.
My commission expires March 30, 1937.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No.

REGINALD P. RAY, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

Affidavit of Richard E. Silberman.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Richard E. Silberman, of full age, being duly sworn upon his oath, deposes and says:

I am a member of the New Jersey Bar and have been actively engaged in the conduct of the appeal to the United States Circuit Court of Appeals in the above-entitled cause.

On November 2, 1936, Judge Patterson signed an order settling the stenographer's minutes of the trial as the bill of exceptions herein. The said bill of exceptions was immediately filed with the Clerk of the United States District Court for the Southern District of New York.

Pursuant to the proposed procedure suggested by the Circuit Court of Appeals for the Second Circuit, which was to withdraw the stenographer's minutes from the files and proceed to reduce the bill of exceptions to condensed and narrative form, an order was obtained from the Senior Circuit Judge on the 5th day of November, 1936, authorizing the defendant to withdraw the said stenographer's minutes and directing the clerk of the said Circuit Court of Appeals to allow said withdrawal. A copy of said order is hereto annexed and made part hereof. This order was duly filed with the Clerk of the said Circuit Court of Appeals.

On the following day your deponent, together with the defendant Mr. Ray appeared before the Clerk of the Circuit Court of Appeals and requested the stenographer's minutes. We were informed by said clerk that he did not have the minutes in his file and that the practice followed in his office was that the original record was retained by the clerk of the District Court and that nothing was forwarded to him until the record was printed. We informed the clerk that under paragraph 3 of Rule IX of the Supreme Court in Criminal Cases, it was the duty of the clerk of the District Court forthwith to transmit all of the records filed in his court, together with his certificate as soon as the bill of exceptions was settled and filed.

The clerk thereupon informed us that he was not aware of any such practice and that it was definitely not the practice in his office.

We thereupon took the original order of the Circuit Judge allowing the withdrawal of the bill of exceptions and appeared before the clerk of the United States District Court for the Southern District of New York and requested him to give us the stenographer's minutes. He refused to do this without an order of a District Court Judge and we then told him that according to the rules the stenographer's minutes should not be in his possession but should have been forwarded to the Circuit Court of Appeals. He told us that he had never heard of such a practice and that this was never done in his office.

We read to him the third paragraph of Rule IX and he then said he had never heard of this procedure but suggested that we speak to a Miss Mahoney, one of the assistant clerks in his office who would be familiar with appellate procedure.

We thereupon appeared before Miss Mahoney and told her what had transpired. She informed us that she knew of the new rules in Criminal Cases but that they had been

completely disregarded in this Circuit and that the old procedure was still followed. She then took a certified copy of the order of the Circuit Court and entered it in the docket in the District Court and then accompanied us to the clerk in the filing room and finally after much difficulty persuaded him to release the stenographer's minutes which are now in our possession.

Your deponent has inquired at the office of the clerk of the District Court and at the office of the clerk of the Circuit Court of Appeals, and is informed that, up to the date of the making of this affidavit, no record in this cause has been transmitted to the clerk of the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX of the Criminal Appeals Rules.

Your deponent further states that on October 20, 1936, when an application was made to the trial judge for a further extension of time within which to settle and file the bill of exceptions herein and it was indicated that he had no power to grant a further extension, the trial judge stated that he had always given additional extensions of time in similar circumstances and that he was willing to do so now.

Your deponent further states that on October 27, 1936, when the Circuit Court of Appeals suggested the procedure finally adopted, it was stated to that court, in response to its question, that so far as the petitioner was concerned a narration and condensation for settlement could be completed within the time still remaining.

RICHARD E. SILBERMAN.

Sworn to and subscribed before me this 28th day of December, 1936.

[SEAL.]

ALFRED C. SWETT,
Notary Public, New York County.

N. Y. Co. Clerk's No. 763, Reg. No. 7-S-1021.
My commission expires March 30, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

No. C-96881.

THE UNITED STATES OF AMERICA, *Plaintiff*,

against

J. CRAWFORD STEVENS, FREDERICK P. CONDIT, REGINALD P. RAY, PHILIP H. KUSS and THE WESTCHESTER TITLE & TRUST COMPANY, *Defendants*.

Order.

Good cause appearing, it is on this — day of November, 1936,

Ordered, that the clerk of this Court be and he hereby is authorized and directed to deliver to the defendant, Reginald P. Ray, the bill of exceptions heretofore filed in this appeal consisting of five volumes of the typewritten stenographic minutes of the trial, one volume containing the summation of Walter Brower, Special Assistant to the United States Attorney General, and one volume containing the charge of the court and other proceedings after the trial consisting of 3,981 pages in all; and it is further

Ordered, that the defendant Reginald P. Ray be and he hereby is authorized to withdraw the aforesaid bill of exceptions and retain same until the further order of this Court.

MANTON,
U. S. C. J.

Endorsed: Filed Nov. 5, 1936.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

REYNOLDS ROBERTSON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

vs. *Petitioner,*

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

While the Government opposes the granting of the writ in this case, and states that it believes that the ultimate conclusion of the Circuit Court of Appeals is correct (brf. 10), it advances no argument in support of the reasoning of the opinion of the Circuit Court of Appeals, nor in contravention of the five grounds of error in the proceedings below relied upon in the petition for certiorari as reasons for the allowance of the writ (petn., pp. 16-35).

The sole argument advanced in opposition to the granting of the writ is the contention of the Government that the Circuit Court of Appeals in this case erred in holding that the settlement and filing of the bill of exceptions was timely.

It is conceded that, by timely order, the district judge extended the time for filing the bill of exceptions "to and including the 1st day of November, 1936" (R. 15). November 1, 1936, was a Sunday, and the Government's whole point is that, in holding the settlement and filing of the bill on November 2, 1936, to be timely on the ground that Criminal Appeals Rule XIII provides that Sundays shall be excluded for the purpose of computing time specified in those Rules, the Circuit Court of Appeals was in error.

The Government admits that if the trial judge's order of extension had in terms specified a certain number of days or months, expiring on November 1, 1936, Rule XIII would apply and the settlement and filing in this case would be timely (brf., p. 13). Its position is that a different rule obtains where the trial judge's timely order of extension runs to a specified date, and not for a specified number of days or months.

For this proposition the Government cites no authority under the Criminal Appeals Rules, and none of the authorities which it cites as analogous has any pertinent bearing. Its argument in essence is that the trial judge must have intended that November 1, 1936—though a Sunday—should be the last date for settlement because he specified that date in his order, and that this justifies the exclusion of the operation of Criminal Appeals Rule XIII.

Whatever force such an argument might have in some cases, it clearly has none whatever in this case, for here the trial judge himself, on Friday, October 30, 1936, being expressly informed that his extension expired on Sunday, November 1, nevertheless suggested that the petitioner delete certain portions of the bill of exceptions and appear before him—not on Sunday, November 1, 1936—but on Monday, November 2, 1936 (R. 24). Government counsel were present at this time and they agreed to appear before

the trial judge on November 2 without a formal notice or order (R. 24).

In these circumstances, it seems clear that the Government's argument that the rule excluding Sundays should not be applied loses all force. On its face, the record shows that the trial judge, in selecting November 1 as the last date, was not intending to select a Sunday, and when he was informed that it was a Sunday he suggested that the parties appear before him on the following Monday. This practical construction of his own order by the trial judge makes it clearly apparent that the Government's present contention cannot be supported in reason. It has no support in authority.

The Government's argument also involves an untenable and unprecedented construction of Criminal Appeals Rule XIII. Although the Government fails so to state (Govt. brf., p. 12), prior to the promulgation of the Criminal Appeals Rule the doctrine relating to the settlement of a bill of exceptions when the last day fell on a Sunday was the same whether the period of time was measured in months or days or was to a day certain. (See *Maresca* v. *United States*, 277 Fed. 727; cert. den. 257 U. S. 657.) The Government admits that Criminal Appeals Rule XIII was intended to change the previous doctrine (brf., p. 12), and in the next breath (p. 13) seeks to limit the effect of the new rule to the case of an extension measured in months or days. However valid such an argument may be in respect of a case involving an extension of time to a day certain which is a court day, it is submitted that it would be wholly unwarranted to hold the rule inapplicable to *any* case of an extension of time to a day certain when that day falls on a Sunday. Since the first statute of limitations ever enacted, the courts have recurrently faced the problem of limitations expiring upon a Sunday, and in all branches of the law rules and statutes have from time to time been

enacted or promulgated extending the time to the next court day where the last day otherwise would fall on a Sunday. An example, among many which could be cited, is Equity Rule 80 of this Court which provides that:

> "When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday."

The bill of exceptions situation remained for many years one of the few fields of the law in which there was no statute or rule of court extending the time until the next court day when the last day otherwise fell on a Sunday; and when this Court promulgated the Criminal Appeals Rules it dealt with the situation by Criminal Appeals Rule XIII which provides:

> "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded."

This is broader than, and certainly must include, the rule announced in Equity Rule 80. On any other construction, this Court would have failed to provide by Criminal Appeals Rule XIII for the commonest type of situation which has confronted the courts for many years, *i. e.*, the case where the time expires on a Sunday.

Assuming *arguendo*, however, that the provisions of Criminal Appeals Rule XIII excluding Sundays from the count did not apply to this particular order, nevertheless, the settlement and filing of the bill on the Monday is timely under the well-settled "special circumstance" line of cases. Even though it was definitely settled before the promulgation of the Criminal Appeals Rules that the bill of exceptions must be settled and filed before the end of the term, or the end of a timely extension, the cases all recognized

that in special circumstances a later settlement and filing would be sustained. It is unnecessary to review all the cases, since *Taylor* v. *United States*, 286 U. S. 1, 4, 5, is almost exactly in point on the facts and affords precise support for the settlement of the bill on the Monday where the last day fell on the previous Sunday, and where special circumstances such as those existing in the present case are shown. In that case the parties, failing to find the judge in his chambers on the Friday, agreed to ask his signature on the Monday, although the time expired on the Sunday. This Court said that, while negativing any intent to relax the general rule, the circumstances were such that the petitioner was entitled to the benefit of his bill. This ruling was made by this Court over an argument presented by the Government very similar to the one now presented, and in which cases now relied upon by the Government, including the *Maresca* case, were cited and stressed.

In the present case the facts are that the trial judge had the bill of exceptions before him as early as the previous Wednesday, October 28, 1936 (R. 23), and he in fact signed and settled it on the Friday, October 30, 1936, but subsequently on the same day struck his signature (R. 24). As a result of subsequent proceedings on the same day, Friday, October 30, at which all counsel were present, the trial judge suggested the deletion of certain matter from the bill and that the parties then appear before him on the Monday, November 2 (R. 24). On that Monday, all counsel being present, the bill was settled and filed (R. 25).

The *Taylor* decision, and prior decisions supporting it, have never been overruled, and the principle of fair play which they embody is clearly applicable to the present case. There is nothing in the Criminal Appeals Rules to change the decision in the *Taylor* case, and, so far as petitioner is aware, it has never been held that the Criminal Appeals

Rules in any way affect the validity of the ruling in the *Taylor* case.

We submit with confidence, therefore, that the point upon which the Government opposes the issue of this writ is wholly without merit for at least three reasons: (a) the argument is based upon a construction of the intention of the trial judge (Govt. brf., p. 13) which is completely negatived by the trial judge's action as shown by this record; (b) it calls for an unwarranted and unprecedented construction of Criminal Appeals Rule XIII; and (c) in any event, the exceptional circumstance doctrine of fair play applies and the settlement of the bill on the Monday was timely.

Neither the specific ground of opposition argued by the Government, nor anything contained in its brief, affords reason, we submit, for denying a review of the important jurisdictional and procedural questions involved in this case.

Respectfully submitted,

REYNOLDS ROBERTSON,
Counsel for Petitioner.

(8660-C)

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FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

WILLIAM D. WHITNEY,
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Counsel for the Petitioner.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR THE PETITIONER.

Opinions Below.

The District Court rendered no opinion. The only opinion rendered by the Circuit Court of Appeals is the *per curiam* opinion on the petition for rehearing. This opinion is reported in 86 F. (2d) 942, and appears in the record at R. 29-31.

Jurisdiction.

The order of the Circuit Court of Appeals was entered December 4, 1936 (R. 18), and its order denying petition for rehearing was entered December 26, 1936 (R. 32). The petition for writ of certiorari was filed December 29, 1936, within thirty days of either of the dates last named. See C. A. R. XI,[1] 292 U. S. 665; *Craig* v. *U. S.*, 298 U. S. 637;

[1] The Rules of Practice and Procedure in Criminal Cases (292 U. S. 601) are hereinafter cited as C. A. R. or "Criminal Appeals Rules."

Weinblatt v. *U. S.*, 298 U. S. 637. The writ was granted by order of this Court of February 8, 1937 (R. 32). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938).

Statement of the Case.

Petitioner was convicted and sentenced in the District Court of the United States for the Southern District of New York for violation of the mail fraud and conspiracy statutes (R. 4-5). His timely appeal to the Circuit Court of Appeals was based chiefly upon specifications of errors occurring during the course of the trial. That court dismissed his appeal upon the ground that his bill of exceptions, although timely settled, had not been put in narrated and condensed form before its settlement.

As shown by the petition for writ of certiorari, which this Court granted on February 8, 1937 (R. 32), the case involves the question of the power of a Circuit Court of Appeals to hear and determine an appeal in a case where the bill of exceptions was timely settled but does not comply with the rules as to condensation and narration. No question of the validity of the conviction of petitioner is involved on the record before this Court on this certiorari, that record being confined to the jurisdictional and procedural aspects of the case. An understanding of them, however, involves a somewhat detailed statement of the procedure actually followed below in this case.

In the statement of grounds of appeal accompanying the notice of appeal herein (R. 9) the point was made, among others, that as a matter of law there was no evidence sufficient to sustain the verdict or judgment. It became necessary, therefore, that the bill of exceptions [2] should embrace the whole of the evidence—4,000 pages of testimony and

[2] C. A. R. IX, par. 2; Supreme Court Rule 8.

500 exhibits (R. 29)—in order that the record might show affirmatively that it contained the purport and substance of all the evidence and thus avoid the presumption that omitted evidence justified the verdict and judgment.[3] On July 27, 1936, the trial judge, on application, extended the time to file and serve the bill of exceptions and assignment of errors until November 1, 1936 (R. 15).

Financially unable to engage his trial counsel to conduct the appeal, petitioner undertook the task himself[4] with the assistance, commencing early in August, of two newly admitted members of the New Jersey bar (R. 20, 29). After these gentlemen had read the record in connection with the preparation of the assignment of errors, efforts were made to confer with Government counsel respecting the form and contents of the bill of exceptions; but these were unavailing until the middle of September, at which time such a conference was held (R. 20). Government counsel were of the opinion that no condensation at all was practicable in view of the nature of the assignments of error; but they agreed to receive and consider a sample narration and condensation of a part of the testimony (R. 20-21). Petitioner thereafter submitted a sample narration and condensation of 600 pages of the testimony. Late in September, Government counsel advised that they were correcting and redictating the condensation submitted, but that the testimony of this petitioner would have to go in *verbatim* (R. 21).

By middle October petitioner had another 1,000 pages ready for submission—but Government counsel had not at that time, and have never at any subsequent time, returned with their corrections even the first batch of narrative and condensation submitted to them (R. 21).

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[3] *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 390, 391; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 488-490.

[4] Petitioner has been a member of the Bar since 1904, but has never been in active practice (R. 20, see R. 29).

Convinced that no agreement as to a condensed and narrative bill of exceptions could be reached with Government counsel within the remaining time, petitioner applied for a further extension of time for the settlement of the bill; and Judge Patterson, who as trial judge was familiar with all the circumstances and was best able to judge what the interest of justice required, stated that he would allow a further extension of two months on October 20, 1936 (R. 21, 17 and see R. 29-30). At the hearing on this application, Government counsel stated affirmatively that they did not oppose the relief sought, but would not formally consent since they deemed the trial judge to be without power under C. A. R. IX, par. 1,[5] to grant extensions except on order made within thirty days of the taking of the appeal. Upon investigation of the opinion expressed by Government counsel, petitioner came to the conclusion that it would be unsafe to rely upon a further extension given by the trial judge[6] and no order further extending petitioner's time was entered (R. 17).

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[5] "In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice."

[6] *Yep* v. *U. S.*, 81 F. (2d) 637, 638 (C. C. A. 10); *Gallagher* v. *U. S.*, 82 F. (2d) 721, 722 (C. C. A. 8). *Cf. Wolpa* v. *U. S.*, 84 F. (2d) 829, 831 (C. C. A. 8), cert. den. Jan. 4, 1937. But *cf. Fierman* v. *U. S.*, 84 F. (2d) 968 (C. C. A. 3). Since that time there have been several decisions adopting the Government's view: *Spero* v. *U. S.*, 85 F. (2d) 134 (C. C. A. 8), cert. den. Nov. 23, 1936; *Cusomano* v. *U. S.*, 85 F. (2d) 132 (C. C. A. 8); *Slade* v. *U. S.*, 85 F. (2d) 786 (C. C. A. 10); *Cory* v. *U. S.*, 86 F. (2d) 461 (C. C. A. 9), cert. den. Feb. 8, 1937; *St. Charles* v. *U. S.*, 86 F. (2d) 463 (C. C. A. 9), cert. den. Jan. 4, 1937; *Williams* v. *U. S.*, not yet reported (C. C. A. 9), cert. den. Feb. 8, 1937.

Aware that the Circuit Court of Appeals for the Second Circuit had previously decided that Rule IX of the C. A. R. gives an individual judge of the Circuit Court of Appeals acting *ex parte* no power to grant additional extensions of time to settle bills of exceptions,[7] and that this Court had refused to review that ruling on certiorari,[8] petitioner applied for relief, not to an individual judge of the Circuit Court of Appeals, but to that court as a whole (R. 22). The theory was, that, under Rule IV of the C. A. R. entitled *"Control by Appellate Court"*, supervision and control of the appellate proceedings, "including the proceedings relating to the preparation of the record," had vested in the Circuit Court of Appeals as of the date of the filing of the duplicate notice of appeal in that court,[9] and that under that rule the Circuit Court of Appeals had specific au-

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[7] *U. S.* v. *Adamowicz*, 82 F. (2d) 288, at least when not assigned to sit in the District Court in the absence, disability or death of the trial judge, Rule XIII, C. A. R.

[8] 80 L. Ed. 747.

[9] Paragraphs 1 and 2 of Rule IV, C. A. R. provide:

"The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal."

Notices of appeal were filed by this petitioner in the trial court on June 30, 1936 (R. 6) in compliance with paragraph 3 of Rule III, C. A. R., but the trial court clerk did not file the duplicate notice with the clerk of the Circuit Court of Appeals until August 9, 1936 (see endorsements, R. 10). While the control of the appeal vested in the appellate court as of the latter date and, therefore, existed at the time (October 20-27, 1936) of the application for relief to the appellate court referred to in the text above, the delay by the trial court clerk of forty days in filing the notice of appeal can scarcely be squared with the requirement of Rule IV that he shall file it "immediately"; and this is but one of a number of instances of practical disregard of the C. A. R. exhibited by this case.

thority to "modify any order made by the trial judge or by any judge in relation to the prosecution of the appeal • • •", and could modify the extension order of July 27 to allow a longer time for settlement of the bill of exceptions. The application for relief under Rule IV was heard by the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ), through the medium of a bi-party argument on October 27, 1936 (R. 22), and the view as to the scope of the power of that court under Rule IV as above set forth was specifically pressed upon the court (R. 22).

While the Circuit Court of Appeals rendered no written opinion upon this application, the judges present at the hearing then indicated (a) that they doubted the power of the trial judge to grant a further extension; (b) that they did not regard Rule IV as giving the Circuit Court of Appeals the power suggested; but (c) they unanimously suggested, as a compromise measure, that in the circumstances of this case, and in order to avoid any jurisdictional question, an application should be made to the trial judge for an order settling the stenographer's verbatim transcript as the bill of exceptions, and that thereafter an application might be made to the Circuit Court of Appeals for time to prepare, agree upon and print a condensed and narrative record under Rule IX, par. 4, C. A. R. (R. 23).[10]

As appears by the uncontradicted affidavit of this petitioner in the record now before this Court (R. 23), the following occurred in connection with the hearing of the application discussed immediately above:

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[10] The rule provides that after the bill of exceptions has been settled and the record on appeal filed with the clerk of the Circuit Court of Appeals:

> "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or *reduction* of the record filed with the appellate court, and may issue such directions to the trial court or trial judge, in relation thereto, as may be appropriate." [Emphasis added.]

> "Judge Hand at this time stated in substance, 'I do not believe that you will oppose such an application, Mr. Brower.' Mr. Brower stated that he might oppose this application. Whereupon, Judge Hand said in substance, 'I think that upon reconsideration, you will withdraw your opposition.' And Judge Manton said in substance, 'That is the direction of this court.' "

On the following day petitioner applied to Judge Patterson to settle the stenographer's minutes as the bill of exceptions; and this motion was opposed by Government counsel upon the ground that the trial judge was without power to do so since the requirements as to condensation and narration had not been complied with (R. 23). Judge Patterson at first granted the motion and signed an order settling the bill of exceptions in the form presented, but shortly thereafter struck his signature and denied the motion (R. 24). Petitioner immediately applied to the Senior Circuit Judge, who agreed to convene the Circuit Court of Appeals to hear an application for mandamus or other relief; but before this proceeding had been consummated a conference was held with Judge Patterson and Government counsel in the chambers of the Senior Circuit Judge at which time Judge Patterson suggested that petitioner strike the colloquy of counsel from the stenographer's minutes, thus accomplishing a condensation, and appear before him on the following Monday, November 2, for settlement of the bill (R. 24). This was done and the minutes again presented for settlement on Monday, November 2. Judge Patterson at first refused to settle the bill, on the Government's suggestion that it was presented out of time and that he was without power to do so; but, later on the same day, being convinced that Sundays are excluded from the count under the C. A. R., he signed an order settling the stenographer's minutes, as condensed, as constituting the bill of exceptions (R. 25).

As appears by the uncontradicted affidavit of this petitioner in the record before this Court, "Judge Patterson stated that error might have been committed and that he did not wish to deprive your petitioner of his appeal" (R. 25).

On the same day, November 2, 1936, the settled bill of exceptions and assignment of errors were filed with the clerk of the trial court [11] (R. 25), in compliance with paragraph 1 of Rule IX, C. A. R.

On November 4, desiring to withdraw the bill of exceptions from the office of the clerk of the Circuit Court of Appeals in order to finish the narrative thereof for the use of that court pursuant to the procedure previously suggested by the Circuit Court of Appeals, petitioner secured an order from the Senior Circuit Judge dated November 5, 1936, directed to the clerk of the Circuit Court of Appeals,

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[11] It thereupon became the mandatory duty of the clerk of the trial court to send the record, including the bill of exceptions and assignment of errors, to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX, C. A. R., which reads as follows:

> "Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal."

The clerk of the trial court has never taken any steps whatever to comply with this rule, and, according to the best information that this petitioner can obtain, does not intend to do so (see affidavit of Silberman, Pet. p. 39). When petitioner and his assistants appeared in the office of the clerk of the trial court and demanded that the bill of exceptions and the rest of the record be sent to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX, the clerk of the trial court said that he had never heard of any such practice, and that such procedure is never followed in his office, but that the appellant was required to make deposit for printing with the trial court clerk and have the record printed by him before it was sent to the Circuit Court of Appeals; and that this old practice which formerly obtained was still followed by his office, the C. A. R. to the contrary notwithstanding (affidavit of Silberman, Pet. 38-39).

to permit petitioner to withdraw the bill of exceptions from the clerk's office for that purpose (see affidavit of Silberman, Pet. p. 37). It was then discovered that neither the bill of exceptions nor any other part of the record had been transmitted to the Circuit Court of Appeals by the District Court clerk.

Meanwhile, and on November 16, 1936, Government counsel secured from the clerk of the trial court certified copy of the docket entries in the case and certificate that appeal had been allowed (R. 1-6, 12), and moved the Circuit Court of Appeals to docket and dismiss the appeal under Rule XIV of the Circuit Court of Appeals [12] upon the ground that petitioner had failed to docket the case in the Circuit Court of Appeals in time, and because the bill of exceptions was not settled in compliance with Rule IX, C. A. R. (R. 11). The affidavit of Government counsel in support of the motion to docket and dismiss raised both the contention that the bill of exceptions was ineffective because not in condensed and narrative form, and that it had been allowed and settled out of time (R. 14). By opposing affidavit your petitioner called attention of the Circuit Court of Appeals to the facts of which it was already aware, and which have been detailed above, including the fact that the procedure which the petitioner had followed with respect to the bill of exceptions was that suggested by the Circuit Court of Appeals itself (R. 16-18).

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[12] Reading (so far as is pertinent) as follows:

> "In criminal cases it shall be the duty of the appellant to docket the case and file the record within the time fixed by Rules VIII and IX of the rules of the Supreme Court in criminal cases. If the appellant shall fail to comply with this rule, the appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed."

On December 4, 1936, the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ.) entered an order dismissing the appeal "for lack of jurisdiction" (R. 18). No opinion was delivered in connection with this order.

On December 9, and well within the time allowed by the Circuit Court of Appeals Rules (Rule XXVI, C. C. A.), petitioner filed an application for a rehearing (R. 19-27), duly sworn to by himself (R. 28) and by Messrs. Silberman & Stern (R. 27-28), who are the two members of the New Jersey bar who had been assisting him, and who were aware of the facts and proceedings as stated herein. This petition recited these facts and proceedings at length; renewed the arguments for the construction of the C. A. R. previously advanced; specifically requested the Circuit Court of Appeals to exercise its discretionary power under the C. A. R. to accord petitioner relief; asserted that failure so to do would constitute an abuse of discretion; and prayed that, at the least, the Circuit Court of Appeals should indicate the ground of its decision in order that review in this Court might be had (R. 27).

The facts stated in this petition for rehearing with respect to the proceedings (as hereinbefore detailed) were not controverted by the Government nor questioned by the Circuit Court of Appeals in its subsequent opinion or otherwise.

The Circuit Court of Appeals held the application for about two weeks, and on December 22 announced its *per curiam* opinion (R. 29-31) and its order (R. 32). The opinion recites the case was pending on "motions for reargument of motions to correct the record, also to dismiss the appeal" (R. 29), and it concludes, "The motion to amend the record is denied and the motion to dismiss the appeal is granted." The order recites the denial of a motion "for a reargument of the motions to correct the record and dismiss the appeal" (R. 32). As a matter of fact, there was

never any motion to amend or correct the record. There was never any question as to the accuracy of the record, nor any attempt to correct it. What your petitioner had urged in opposition to the motion to docket and dismiss and in support of the petition for rehearing was that the Circuit Court of Appeals, among other courses, has authority under paragraph 4 of Rule IX, C. A. R., to direct a "*reduction* of the record" to condensed and narrative form in order to comply with the requirements, and that it can do that either by remitting the record to the trial court, or by letting the record, including the bill of exceptions as settled, stand as and when filed in the Circuit Court of Appeals, but having the work of completing the narrative condensed version of that bill done by counsel in the Circuit Court of Appeals, and the case argued on the basis of that condensed narration.

The opinion of the Circuit Court of Appeals upon the petition for rehearing did, however, accede to the request of petitioner for a statement of the grounds of decision. The opinion makes the following rulings:

(1) That in view of the exclusion of Sundays and holidays in computing the time under the C. A. R. (Rule XIII, C. A. R.), the settlement of the bill of exceptions on Monday, November 2, was timely and was within the period of the initial extension (R. 30);

(2) but that the appeal must be dismissed because the assignment of errors included a contention of lack of evidence to support the indictment, and this required an examination of all the evidence, and that since the bill of exceptions was not in condensed and narrative form, it was insufficient (R. 31).

In making this ruling, the Circuit Court of Appeals took no exception to the accuracy, inclusiveness or timeliness of the settlement of the bill of exceptions, but placed its ruling

squarely and solely on the ground that it was not in narrative and condensed form.[13]

(3) that the Circuit Court of Appeals could not remit the record to the District Court to permit the narration and condensation to be accomplished, because the time for the settlement of the bill of exceptions had expired; and that in this aspect the time limitation provisions of Rule IX, C. A. R., must be regarded as making the rule of *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, inapplicable in criminal cases (R. 31);

(4) that the provisions of Rule IX, C. A. R., authorizing the Circuit Court of Appeals to entertain a motion by either party for the correction, amplification or reduction of the record filed with the appellate court or to issue directions to the trial court in relation thereto do not authorize the Circuit Court of Appeals to do so with reference to the bill of exceptions.

(5) After placing its decision squarely upon grounds of lack of jurisdiction and power, the Circuit Court of Appeals added briefly at the end of its opinion: "The appellant had four months and has offered insufficient excuses for his delinquency" (R. 31).

Specification of Errors.

1. The Circuit Court of Appeals erred in dismissing the appeal upon the ground the bill of exceptions was not in condensed and narrative form.

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[13] It may be noted, in addition, that due to the disregard of rules by the trial court clerk the assignment of errors was not before the Circuit Court of Appeals and that court had no means of knowing, and apparently did not inquire, whether there were any assignments going to errors on the record proper which would require consideration even in the absence of a bill of exceptions. While petitioner does not suggest that such was the fact, yet the point is mentioned here to indicate the dangers which inhere in the disregard of orderly procedure.

2. The Circuit Court of Appeals erred in holding that it was without power to direct or permit the reduction of the bill of exceptions to condensed and narrative form.

3. The Circuit Court of Appeals erred in holding it could not remit the record to the District Court to permit narration and condensation.

4. The Circuit Court of Appeals abused its discretion in dismissing the appeal under the circumstances of this case.

5. The Circuit Court of Appeals erred in dismissing the appeal when it did not have the assignment of errors and bill of exceptions before it.

Summary of Argument.

Point I.

THE RULING OF THE CIRCUIT COURT OF APPEALS DISMISSING THE APPEAL FOR WANT OF NARRATION AND CONDENSATION OF THE BILL OF EXCEPTIONS WAS BASED UPON A CONCEIVED LACK OF POWER TO AFFORD PETITIONER ANY RELIEF IN THE PREMISES. IF IT CAN BE VIEWED AS A REFUSAL TO EXERCISE A DISCRETIONARY POWER, IT CONSTITUTED A GROSS ABUSE OF DISCRETION.

Point II.

THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT IT WAS WITHOUT POWER TO REMIT THE RECORD TO THE DISTRICT COURT FOR COMPLIANCE WITH THE REQUIREMENT AS TO CONDENSATION AND NARRATION OF THE BILL OF EXCEPTIONS.

Point III.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE CRIMINAL APPEALS RULE DID NOT VEST IT WITH DISCRETIONARY POWER TO DIRECT OR PERMIT THE REDUCTION OF THE BILL OF EXCEPTIONS TO CONDENSED AND NARRATIVE FORM.

Point IV.

THERE HAS BEEN SERIOUS DISREGARD OF ORDERLY PROCEDURE BY THE CLERK OF THE UNITED STATES DISTRICT COURT AND IN THE DETERMINATION OF THE APPEAL BY THE CIRCUIT COURT OF APPEALS.

Point V.

THE BILL OF EXCEPTIONS HEREIN WAS SETTLED AND FILED WITHIN THE TIME REQUIRED BY C. A. R. RULE IX.

POINT I.

The Ruling of the Circuit Court of Appeals Dismissing the Appeal for Want of Narration and Condensation of the Bill of Exceptions Was Based Upon a Conceived Lack of Power to Afford Petitioner Any Relief in the Premises. If It Can Be Viewed as a Refusal to Exercise a Discretionary Power, It Constituted a Plain Abuse of Discretion.

Petitioner believes that a reading of the opinion below makes it clear that the order of dismissal was based upon the ground of want of power. Moreover, the events in the four or five days immediately preceding the settlement of the bill of exceptions make it apparent that the Circuit Court of Appeals was willing, and even anxious, to find for petitioner a way out of his difficulties. The remedial procedure it finally suggested and directed to be followed was the settling of the stenographer's verbatim transcript as the bill of exceptions with the understanding that an application would thereafter be made to it for time to prepare, agree upon, and print a condensed and narrative record under Rule IX, Par. 4, C. A. R. (R. 23). The dismissal of the appeal because the bill of exceptions had been settled in this form could only have resulted from a determination, after reconsideration, that the suggested pro-

cedure was beyond its power. Otherwise, the action taken would have been capricious and arbitrary.

But if the decision below is to be regarded as a discretionary refusal to accord relief within the power of the appellate court to grant, then it must be reversed because constituting a patent abuse of discretion. In *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 386, 387, the appellant had totally failed to observe the requirements respecting condensation and narration, and the Circuit Court of Appeals, which had previously consistently overlooked such failures, took notice of it in that case and dismissed the appeal. This Court held that it was within the power of the Circuit Court of Appeals to remit the transcript to the trial court so that full compliance might be had with the rule respecting condensation and narration. It further held that the Circuit Court of Appeals had abused its discretion in dismissing the appeal rather than in remitting the transcript. The abuse was said to lie in the fact that the harsh penalty of dismissal was invoked "notwithstanding the transgression was largely due to its [the Circuit Courts of Appeals'] own course of action" in being lax in enforcement of the rule in prior cases.

This is not the *Barber Asphalt* case. We do not place our argument upon the ground that in other criminal cases the Circuit Court of Appeals has been lax in enforcing the rules as to condensation and narrative—although we are informed that such is the fact. This case is worse than the *Barber Asphalt* case from the standpoint of abuse of discretion. Here was no mere laxity in previous cases which lulled counsel into a sense of security. Here the appellate court, when a motion for relief was made to it under Rule IV, C. A. R., affirmatively took a hand in the situation, ruled that the relief asked for was not proper, suggested that it had the very power which it now denies that it has, and

directed that the precise procedure followed by this petitioner should be followed. If the Circuit Court of Appeals does have the power which it thought it had at the hearing on October 27, and which this petitioner maintains that the rules intended it to have, then we can conceive of no greater abuse of discretion than in refusing, in the circumstances of this case, to exercise it.

At the time this suggestion and direction were made by the appellate court, the petitioner had already reduced to narrative form a substantial portion of the evidence and he still had six days left before the settlement date. While it is true that the Government had not at that time agreed to any of the narrative, it cannot be assumed that if the Circuit Court of Appeals had not suggested this alternative procedure and had merely denied the relief under Rule IV that the petitioner could not have completed the narration of the remaining evidence within the time and procured the trial judge to settle it even if the Government would not agree. Moreover, as appears by the affidavit of Mr. Silberman (Pet. p. 39), it was stated to the Circuit Court of Appeals on behalf of the petitioner, at the argument on October 27, that this petitioner, so far as he was concerned, could complete his narration and condensation for settlement within the time still remaining. If that procedure had been followed and the bill settled without the Government's concurrence, then the Government, if so advised, could have come into the Circuit Court of Appeals afterwards and moved on five days' notice under par. 4 of Rule IX, C. A. R., to correct or change the record. The Circuit Court of Appeals, however, suggested and "directed" that petitioner should present the stenographer's minutes for settlement as the bill of exceptions, and thereafter get together with the Government for a condensation. This procedure was put forward by the Circuit Court of Appeals "in order to avoid any jurisdictional

question" (R. 23). By the suggestions and directions of the appellate court, therefore, the appellant was lulled into a situation which was far more the result of the action of the appellate court itself than in the *Barber Asphalt* case, and which had far more than the "implied sanction" of the appellate court referred to in that case.

Point II.

The Circuit Court of Appeals Erred in Ruling that It Was Without Power to Remit the Record to the District Court for Compliance with the Requirements as to Condensation and Narration of the Bill of Exceptions.

The decision of the Court in the *Barber Asphalt* case makes it plain that normally the Circuit Court of Appeals does have the power to remit the record to the lower court for compliance with the rules as to narration and condensation. The power has been denied in this case by the Circuit Court of Appeals solely upon the ground that the doctrine of that case is no longer applicable to criminal appeals by virtue of the time limitation contained in Rule IX of the Criminal Appeals Rules.

It is true that this Court in the *Barber Asphalt* case adverted to the fact that in equity the power of the trial court to settle the statement of evidence is not limited to the term at which the case was decided. But the basis of the *Barber Asphalt* decision is much broader than this. It rests upon the doctrine that the Circuit Court of Appeals has power to take whatever action may be necessary in order to preserve its appellate jurisdiction. As this Court said in the *Barber Asphalt* case:

> "The Circuit Court of Appeals, by remitting the transcript for compliance with the equity rule, would be in effect directing action in aid of its appellate jurisdiction; and the District Court, in conforming to

the direction, would be recognizing, rather than encroaching, on that jurisdiction. * * *"

The important point in this case is that the bill of exceptions was signed and settled within the time required by the Criminal Appeals Rule IX. There is no question involved as to the accuracy or completeness of the bill of exceptions and the only requirement of any rule that has not been observed is the requirement of Supreme Court Rule 8 that the bill of exceptions shall be in narrated and condensed form.

The history of the rules of this Court requiring condensation and narration clearly demonstrates that these requirements have always related only to a matter of form. They have never governed the procedure, either at law or in equity, by which the evidence became incorporated in the record. The doctrine has always been that the evidence received in a suit in equity cannot become part of the record until made so by some act of the court or judge. Beginning with the first judiciary act of 1789, successive statutes had recognized and sanctioned this doctrine—but they had differed widely as to the form in which the evidence should be presented when so incorporated.[14] At law the evidence always became part of the record by means of the bill of exceptions.

Equity Rule 75b was promulgated in 1912. The requirement respecting condensation and narration was not drawn from the earlier practice but was new. *Barber Asphalt, supra,* at p. 386. As has been heretofore shown, the purpose of Equity Rule 75b was not to initiate a procedure by which the evidence in equity was to become part of the record, but was solely to settle and make uniform the form in which the evidence should be so incorporated. *Barber*

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[14] *Barber Asphalt, supra,* at p. 381; Griswold and Mitchell, The Narrative Record in Federal Equity Appeals, 42 Harv. L. Rev., 483, 487-489.

Asphalt, supra, at p. 381. This equity rule rested in part on statutes of long standing authorizing the Supreme Court "generally to regulate the whole practice to be used in suits in equity" in the District Courts (Rev. St. 913, 917; 28 U. S. C. 730, 723; *Barber Asphalt, supra,* at p. 380); and in part on a new statute enacted February 13, 1911, c. 47, 36 Stat. 901, 28 U. S. C. 865, 866), providing that in any cause or proceeding wherein final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States Circuit Court of Appeals "the appellant or plaintiff in error, in making up and printing the transcript," shall include "such part or abstract of the proofs as the rules of such Circuit Court of Appeals may require, *and in such form as the Supreme Court of the United States may by rule prescribe.*"

The portion of the 1911 statute, emphasized in the above quotation, gave the Supreme Court power, by rule, to regulate the form in which the evidence should be prepared for incorporation into the record. *Barber Asphalt, supra,* at p. 382. Unlike R. S. 913 and 917 which limited the Supreme Court's rule-making power to *equity* cases, the Act of 1911 conferred a limited rule-making power in respect to the *form* of making up the bill of exceptions in law cases as well. *Barber Asphalt, supra,* at p. 382.

Following this 1911 Act, and consonant with the narrow rule-making power in law cases then given it, this Court on December 22, 1911 amended its own Rule 4 to require that district courts in allowing bills of exceptions should give effect to a new requirement that only the evidence necessary to the question of law as to which exceptions were reserved should be set out and that this should be set forth "in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise" (222 U. S. Appendix,

1, 8).[15] This new requirement of Rule 4 of the Rules of 1911 was carried without change into Rule 7 of the Rules of February 13, 1925 (266 U. S. 645, 658) and into Rule 8 of the present Rules of this Court (286 U. S. 598).

The new narration and condensation requirements of both Equity Rule 75b (in respect of suits in equity) and Supreme Court Rule 4 (now Rule 8) were, therefore adopted within a few months of each other (one December 22, 1911, the other May 4, 1912), pursuant to authority of the same statute (Act of February 13, 1911, *supra*), and they both related solely to *form*. Neither rule initiated the requirement, both at law and in equity, that the evidence did not become part of the record until made so by act of the court or judge; and neither rule set any time limit for the doing of that act. As to the requirement of judicial settlement or approval in equity, the long standing of that requirement has already been noted above. At law, this requirement had long been a common law rule. (*Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463.)

It thus appears that a bill of exceptions settled within the time given by Rule IX, but not in compliance with Rule 8, is a timely bill of exceptions exhibiting a *formal* defect. A bill of exceptions containing verbatim testimony is a bill of exceptions, nonetheless. It is not a nullity. The crux of the Government's argument is that condensation and narration at this time involve a resettling of the bill of exceptions, which obviously cannot be done at this date. This was clearly the view of the Circuit Court of Appeals (R.

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[15] Prior to this amendment of Rule 4 in 1911, the rules of this Court relating to bills of exceptions contained no requirement as to narration or condensation. The prior rules contained only prohibitions on the inclusion of the court's charge at large or general exceptions to charges, and to requiring particularity and distinctness in the specification of the matters of law in the charge to which exception was taken. See Rule 38 of the rules of this Court of March 13, 1832, and Rule 4 of the rules of the December term, 1858.

31). Under par. 4 of Rule IX, C. A. R., the Circuit Court of Appeals is expressly given power to order a "reduction of the record filed with the appellate court and may issue such directions to the trial court or trial judge as may be appropriate." The purpose of condensation and narration is to shorten the length of records on appeal. The process is summed up perfectly in the term "reduction" as used in Rule IX. Such a process cannot be regarded, as the Circuit Court of Appeals regarded it, as amounting to a "correction" or "change" (R. 31). The substance of the bill of exceptions as filed remains unimpaired; it is merely telescoped into fewer pages.

Having determined that Rule 8 has the same basis as Equity Rule 75b, any reason for a distinction between the condensation requirements in equity and in a criminal case must be found in the C. A. R. The only change made by the C. A. R. was in the *length* of time allowed in settling a bill of exceptions. The time within which to settle and file the bill of exceptions was changed from the expiration of the term to thirty days from the filing of the notice of appeal (C. A. R. Rule IX). The requirement of condensation was left unchanged. Rule IX merely provides that the bill of exceptions shall be in the form prescribed by Rule 8 of the Supreme Court. This, it is submitted, is no more than a provision that bills of exceptions shall be in the form as heretofore.

The time limit upon settling the bill of exceptions, contained in Rule IX, C. A. R., thus, creates no bar to the application of the doctrine of *Barber Asphalt* to a criminal case. Indeed, the conclusion is inescapable that par. 4 of Rule IX incorporates that doctrine in terms in the C. A. R. This Court in the *Barber Asphalt* case did nothing more nor less that order a "reduction of the record filed with the appellate court" and issued "such directions to the trial court, or trial judge, in relation thereto, as" were "appropriate."

Point III.

The Circuit Court of Appeals Erred in Holding that the Criminal Appeals Rules Did Not Vest It with Discretionary Power to Direct or Permit the Reduction of the Bill of Exceptions to Condensed and Narrative Form.

We believe that the new Criminal Appeals Rules provide an additional and more speedy and flexible procedure even than that of remission of the record to the trial court for condensation and narration of the bill of exceptions. In holding itself without power to give petitioner any relief in the premises, the Circuit Court of Appeals, it is submitted, has failed to appreciate the purpose and spirit of the new rules. These rules are not drawn to govern all the details of procedure in criminal cases. In contrast with the lengthy and involved rules of procedure in many States, these new rules establish a few guiding principles and invest the appellate court with an immediate control of appeals and with a wide discretion to make such orders as shall be necessary to meet the exigencies of particular cases. This is apparent from the face of the rules themselves. Thirteen short rules are designed to cover the whole of Federal appellate procedure. For present purposes it is sufficient to note only Rule IV, par. 2, and Rule IX, par. 4. These provide:

> "From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal." (C. A. R., IV par. 2.)
>
> "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate." (C. A. R. IX, par. 4.)

Under the rule last quoted, as previously pointed out, condensation and narration may be accomplished by exercise of the power of the Circuit Court of Appeals to order a reduction of the record. This *may* or *may not* be done by directions to the trial court. The rule is clearly broad enough to authorize the Circuit Court, where a bill of exceptions has been settled and filed containing all the evidence verbatim, and as to the accuracy of which there is no question, to direct the parties within such time as that court deems proper to file a condensation and narrative for use at the hearing of the appeal. Such a procedure involves no resettling of the bill of exceptions. It is supplying a convenient form of the existing bill of exceptions to aid the appellate court and thereby complying with a rule of form and procedure which, after all, is primarily for the benefit of that court.

It is submitted that both of the procedures urged above (Points II and III) are in harmony with the letter, as well as the spirit, of the C. A. R. Flexibility, with control in the appellate court, is the keynote of the new rules. The rigid construction of the rules adopted by the Circuit Court of Appeals in this case will serve to defeat its own purpose. The difficulties attendant upon the narration of long records are well known to the bench and bar of the Federal Courts.[16]

If it be established that narration must be accomplished before the expiration of the time for the settlement of the bill of exceptions, no matter what the exigencies of the particular situation may be, the inevitable result will be for counsel to insist upon, and for trial judges to grant, inordinately long extensions of time in the first instance. This would contribute to delay in a greater percentage of

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[16] Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, prepared by the Advisory Committee on Rules for Civil Procedure, appointed by the Supreme Court of the United States, pp. XV and 135 *et seq.*

cases than would be the fact if the appellate court had the discretionary power to control the time for narration as the circumstances of each case might warrant. We do not wish to be understood as urging that a proper construction of the C. A. R. would permit narration to be accomplished as a matter of course in the Circuit Court of Appeals in all cases. We argue only that a proper construction will vest in the appellate court a remedial power to be exercised in its sound discretion.

POINT IV.

There Has Been Serious Disregard of Orderly Procedure by the Clerk of the United States District Court and in the Determination of the Appeal by the Circuit Court of Appeals.

As pointed out in the statement of facts (*ante*, p. 12, footnote 13) and as developed in the petition for certiorari (pp. 17-20), the Clerk of the District Court of the United States in this case, in flat disregard of the mandate of C. A. R. IX, par. 3, has never sent the record to the Circuit Court of Appeals. The hearing in the Circuit Court of Appeals was had upon a transcript of docket entries and upon the Government's motion to docket and dismiss—which, as pointed out in the petition for certiorari and as admitted in the Government's brief in opposition to the petition for certiorari, was improper procedure.

The result of these errors has been not only to cause serious inconvenience to the petitioner, but it has also resulted in the Circuit Court of Appeals' dismissing the appeal without even having a copy of the assignment of errors before it. For all that the record before this Court shows, there are assignments of error going to errors on the record proper which would require the Circuit Court of Appeals to hear and determine the appeal even in the absence of any bill of exceptions at all.

These matters—i. e., the failure and refusal of the District Court Clerk to obey the Rule requirement as to sending up of the record; the erroneous action of the Circuit Court of Appeals in entertaining a motion to docket and dismiss; and the disposal of the appeal without reference to the assignments of error, while not dispositive of this case, evidence departures from orderly procedure which should not be overlooked.

POINT V.

The Bill of Exceptions Herein Was Settled and Filed Within the Time Required by C. A. R. Rule IX.

On this point the Circuit Court of Appeals held with the petitioner (R. 30). The contrary argument made by the Government in opposition to the petition for certiorari has been, we believe, sufficiently disposed of in the reply brief on the petition, and will not be repeated here.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals dismissing the appeal herein should be reversed and the cause remanded with proper instructions, to the end that narration and condensation of the evidence may be accomplished and the appeal heard on the merits.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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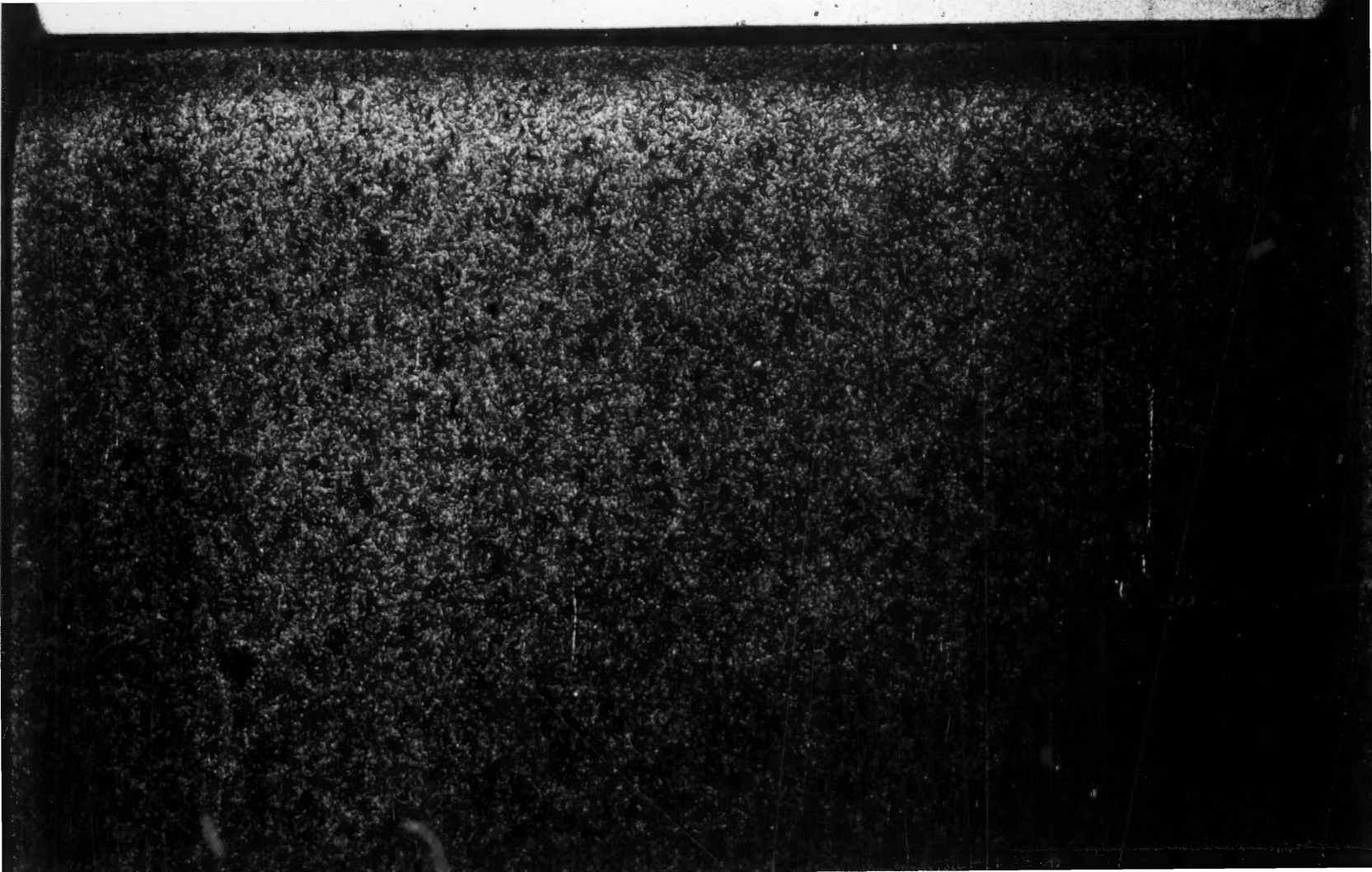

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

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vs.

THE UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF.

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(1) *The Erroneous Rulings as to Lack of Power of trial Judge or of Circuit Court of Appeals to grant additional time for settlement of the bill of exceptions or to modify the original order of extension.—Amendment of Specification of Errors.*

The conclusions announced by the Circuit Court of Appeals with respect to the lack of power of itself or of the trial judge to grant a further extension of time for the settlement of the bill in this case, or to modify the original order of extension, were distinctly made the subject of challenge in the petition for certiorari (pp. 20-23), and are considered in the Government's brief on the writ of certiorari (brf. 20-26). Concluding that the argument on these issues was

sufficiently developed in the petition, petitioner did not repeat it in his brief on the granting of the writ. To preclude the assumption that he has abandoned these points, petitioner now distinctly raises them again, and prays that the Specification of Errors in his brief (pp. 12-13) be regarded as amended to include:

> 6. The Circuit Court of Appeals erred in ruling that the trial judge was without power to grant an additional extension of time for the settlement and filing of the bill of exceptions; and in failing and refusing to rule to the contrary.
>
> 7. The Circuit Court of Appeals erred in ruling that it had no power to grant an additional extension of time for the settlement and filing of the bill of exceptions in this case, and no power to modify the trial judge's original extension orders; and in failing and refusing to rule to the contrary.

It is not thought that additional discussion of these points would be helpful, beyond what has been said in the petition and the Government's brief. In brief, the situation in respect of the first of these points (power to trial judge to grant additional extension within period of first extension but more than 30 days after taking of appeal) is that the decided weight of authority is with the ruling of the court below and supports the Government's argument. Nevertheless there is *obiter* (*Fierman* v. *U. S.*, 84 F. (2) 968—C. C. A. 3) in support of petitioner's view that an additional extension can be granted by the trial judge so long as it is entered within the period of the timely initial extension. Paragraph 1 of Rule IX *can* be read so as to support that view,—the argument being that, if this Court had intended that there should be only one extension, the Rule would have been drawn so as to say so in terms; and that, as the Rule *is* drawn, it negatives an intention to exclude more than one extension, since it provides that the trial judge

"shall give no extension of time that is not required in the interest of justice." Petitioner submits this question for consideration and decision. There is no force in the Government's suggestion (brf. 20-21) that the present record does not raise this question. While no order of additional extension appears in the skeleton record which has come here as a result of the Government's motion to docket and dismiss in the court below, that record does show that "on October 20, 1936, your petitioner applied to the trial judge for an order extending the time within which to settle and file the bill of exceptions and assignment of errors herein for a further period of thirty days. At the suggestion of Mr. Tompkins, the time was enlarged to two months and the trial judge stated that he would grant such extension" (R. 21). The Circuit Court of Appeals plainly had no doubt that this issue was raised on this record, for in its final opinion it notices the point and clearly adopts the majority view as to lack of power (R. 30).

On the second point (the power of the Circuit Court of Appeals to modify the extension order of the trial court, even after the 30 day period after taking appeal), the Government—although itself citing no case whatever upon the point—remarks that petitioner has no cases on the point either, whether before or after the adoption of the C. A. R. There were no cases before the C. A. R., since the point rests upon the existence of the C. A. R. As developed in the petition for certiorari, the argument in favor of the power is the scope and purpose of the Criminal Appeals Rules themselves, and particularly the language of paragraphs 2 and 3 of C. A. R. IV.

(2) *The Government has cited no authority, either before or after the promulgation of C. A. R. denying the Circuit Court of Appeals the power, on time limitation grounds or on any other grounds, to remit the transcript in a criminal*

case or any other law action to the district court for compliance with the requirement as to narration and condensation, or itself to permit that narration and condensation to be done in the Circuit Court of Appeals.

Before considering the Government's authorities on this branch of the case, it seems proper to reiterate what is, and what is not, wrong with the bill of exceptions in this case. As to what is *not* wrong: (a) it has, in fact, been signed and settled by the trial court and filed with the clerk of that court (R. 25), and the Circuit Court of Appeals has ruled that such settlement and filing were timely (R. 30); (b) there is no question as to the accuracy of this bill as a statement of the proceedings at the trial; (c) it cannot successfully be contended that it contains irrelevant matter, since it contains only the evidence and rulings (the colloquy having been stricken before settlement), and the substance of *all* of this is essential in view of the assignment of error as to insufficiency of the evidence (cases cited in petn. p. 2, note 3); and (d) on the other hand it is not contended that the bill is insufficient in the sense that it omits relevant or necessary matter.

The *sole* objection, therefore, is to the *form* of this bill. While, in view of what was said in the *Barber Asphalt* case, we must concede that this requirement of form is an important and substantial requirement, disobedience with which is not excused by the technical error statute, it is important, we submit, that the question of whether it is a *nullity*, or whether, and if so what, remedies for the situation are now available in the hands of the Circuit Court of Appeals, should be approached with an understanding at the outset that the only thing the matter with this bill of exceptions has to do with its *form*.

The petitioner has authorities which establish that, in such a situation, the Circuit Court of Appeals has two distinct

courses which it can pursue, either of which will result in saving the petitioner his appeal, and at the same time in securing compliance with the condensation and narration requirement. As established in petitioner's main brief, the *Barber Asphalt* case, although in equity, is based upon principles equally applicable to a law action, and authorizes the Circuit Court of Appeals (notwithstanding the time for *settlement of a bill of exceptions* has gone by) to retain jurisdiction of the appeal and yet remit the transcript to the District Court to put the evidence in narrated and condensed form. And the alternative remedy insisted upon in petitioner's main brief, was recognized even before the promulgation of C. A. R. In *Caldwell* v. *U. S.*, 36 F. (2) 738, 740 (C. C. A. 10th—1929) the Circuit Court of Appeals, while holding that a *verbatim* transcript of the proceedings at the trial was not a bill of exceptions in compliance with Supreme Court Rule 8 and the identical provisions of Circuit Court of Appeals (10th) Rule 10, nevertheless said it had the power to permit the appellant to remedy the situation by preparing a narration and condensation in the Circuit Court of Appeals, which, when agreed to by appellee, could be printed and filed as the narrative statement in the Circuit Court of Appeals.[1] It is true that in the case last cited the Circuit Court of Appeals felt the *Barber Asphalt* doctrine to be inapplicable at law, but it found a substitute power in itself, even in the absence of the broad discretionary authority now expressly given to the Circuit Courts of Appeals

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[1] The Court there said: "On the oral argument of the case at bar this situation developed, and counsel asked and was given leave to print and file a narrative statement of the evidence in accordance with the rule, which in a law action can only be done by stipulation of the parties. In this respect it is unlike *Barber Asphalt Co.* v. *Standard Co.*, *supra*, which was an equity case. Counsel for the appellant summarized the 352 pages of evidence in 8 printed pages. He failed, however, to secure the approval of the district attorney to the condensation. Our review of some of the errors assigned will therefore be circumscribed."

in criminal cases by C. A. R. IV and C. A. R. IX. It is also true that the court thought it necessary on this procedure to secure the concurrence of the United States Attorney to the narration. But as a practical matter the Court is aware that that is always true of the preparation of narrative and condensed statements. Courts are loath to accept them until the parties themselves have straightened out their differences and agreed upon the form. It was precisely the procedure adverted to with approval in the *Caldwell* case that the Circuit Court of Appeals suggested at first that petitioner follow; and thereafter, when he attempted to follow it, the Circuit Court of Appeals felt compelled to deny its own power to allow this to be done. As pointed out in petitioner's main brief, we are unable to see how such denial can stand in the face of the broad discretionary power now expressly given to the Circuit Courts of Appeals in respect of this very matter by C. A. R. IV and C. A. R. IX.

In decided contrast to the situation of the petitioner (who has the support of these authorities, as well as of the express terms of the C. A. R.) is the position of the Government. Its brief cites no case, either before the C. A. R. or afterwards, which denies to the Circuit Court of Appeals either of the powers which we insist that it has, *i. e.*, the power of remission, and the power to order a reduction of the bill to narrative and condensed form in that court.

The holdings of the cases cited by the Government go no farther than this: that a bill of exceptions in which the evidence is not narrated and condensed is not in proper form—a proposition which petitioner does not deny. The Government cites (brf. p. 30) six decisions of the Tenth Circuit Court of Appeals, all decided at practically the same time and reported in the same volume of the Federal Reporter. These are all short decisions refusing to review errors arising on the trial on the ground that "a literal transcript of all the proceedings at the trial" is not a bill

of exceptions. If the Government's purpose in citing these cases is to show that a bill of exceptions consisting of such a transcript is a nullity, then it fails. The opinions in these cases do not even show whether the transcripts were settled as bills; and it does not appear that any question was there raised as to the power to reduce the record to narrated form in the Circuit Court of Appeals, or to remit it for reduction. Moreover, each of these decisions cites and relies upon the *Caldwell* case, decided by the same Circuit Court of Appeals a short time before, where, as previously noted, it was said that the court did have the power to permit reduction and narration in the Circuit Court of Appeals. It is thus apparent that the Government position (which is, in ultimate, that what was here settled as a bill of exceptions is a nullity), can take no comfort from the Tenth Circuit decisions.

Nor do the decisions of the Second Circuit Court of Appeals—which are the only other decisions cited by the Government as pertinent on this point (brf. 35-36)—afford support for the Government's view. Examination of the five Second Circuit decisions cited by the Government establishes that, despite broad language in some of them to the effect that a stenographer's transcript is not a bill of exceptions, yet in most of the cases the court went ahead anyway to consider and decide the assignments of error going to the evidence, doing so "as matter of grace". But, if the bill of exceptions in such form was a nullity, the court would have had no evidence before it; it would have had to decline jurisdiction of the assignments going to the evidence, and would have had no power to consider them, whether as matter of grace or not. Moreover, none of these decisions indicate that any question was there raised as to the power of the court to correct the situation by remitting the transcript under a *Barber Asphalt* type of

order, or of the power to permit reduction in the Circuit Court of Appeals as suggested in the *Caldwell* case. Again, they were all decided prior to the promulgation of the Criminal Appeals Rules, and, of course, no point was made in those cases of the wide discretionary power as to the makeup of the record now given to the Circuit Court of Appeals by those rules.

(3) *The Government's argument as to the untimeliness of the settlement of the bill has no support in applicable authority and is unsound.*

The Government places primary stress upon its argument that the bill here was settled out of time because this was done on Monday, November 2, while the extension order ran only until November 1. In its brief opposing certiorari the primary ground of this argument was that the provision of the C. A. R. excluding Sundays in computing time is inapplicable where the order of the trial judge in a particular case shows that he picked a day certain to toll the time, thereby intending to make that the last day and do away with the necessity for computation. This is based on the intention of the judge in making his order; and in the reply brief on the petition we pointed out that in *this* case the trial judge has otherwise construed his own order when, on Friday, Oct. 30, 1936, he suggested certain deletions in the bill and, although informed his extension expired on Sunday, directed the parties to come back for settlement—not on Sunday, Nov. 1—but on Monday, Nov. 2. This fact appearing in this case also serves to distinguish the case on which the Government principally relies, *i. e.*, *Cooney* v. *Burt*, 123 Mass. 579. In that case, decided in 1878, the court remarked that the question depended" upon the construction of the special order made by the judge in this case". On its face that order ran to a day certain, and there were no facts to show that, before that day was

reached, the trial judge has otherwise construed his own order, as had the trial judge here.

The Government's next argument on the timeliness point is that, as matter of law, no "computation" is necessary when a day certain is specified; hence the provisions of C. A. R. XIII do not apply. This is hardly distinguishable from the previous argument, and is really answered by what has been said. In addition, as pointed out in our reply brief on the petition (pp. 3-4), it is entirely too narrow a construction of C. A. R. XIII—a construction under which this Court would have failed to provide for the commonest type of situation which arises, *i. e.*, that where the last day falls on Sunday.

Finally, on this timeliness point, the Government argues that the "special circumstance" doctrine of the *Taylor* case (our reply brief pp. 4-6) is inapplicable here because in the *Taylor* case the circumstances which resulted in the presentment of the bill on the following Monday when the time had expired on the preceding Sunday were clearly attributable to delays caused by the United States Attorney. It is true that on this record we cannot say that precisely the same situation here exists—although we do think the record supports an assertion that the United States Attorney's office was not cooperative in the settlement of this bill. But in this case we have an even stronger "special circumstance" than in the *Taylor* case. Here the trial judge, presented with the bill for settlement on the Friday, suggested deletions and that the parties come back on the Monday—although he was expressly informed that his extension order, in terms, ran only till the Sunday (R. 24).

(4) *The Government's argument as to absence of abuse of discretion is unconvincing.*

The only argument under this heading that appears to require attention is the Government's assertion the peti-

tioner's counsel's statement (affidavit attached to petition p. 39) that, *so far as petition was concerned,* narration and condensation could have been completed in the five days remaining between October 27 and November 1, establishes the fact that he has slept on his rights and therefore the court below was correct in refusing him relief.

This argument proceeds as though counsel has admitted that the petitioner could actually get a narrated and condensed bill *settled* within the five days remaining. He said no such thing—but only that petitioner could do his part of the work within that time. But it is a patent fact, well known to any appellate tribunal or practising lawyer, that no trial judge is going to settle an *appellant's version* of a condensed bill without giving the Government counsel full opportunity to object to it, study it, and submit their own version. Particularly is this true in a hard fought case like this one where much of the evidence on vital issues was circumstantial. Petitioner had had experience with Government counsel in this case. He had submitted them a portion of his narrated version more than a month before the settlement date, and though they had promised to make their corrections and revisions, he had had no word from them at all about the matter in the interim (R. 21). This should make it clear that when his counsel stated to the Circuit Court of Appeals that petitioner could complete his part of the work of narration within the time remaining, he meant just that—not that he could get a settled narrated bill within that time.

The Court is here dealing with a case where one who is to all practicable purposes a layman, and who found himself without sufficient funds to retain his experienced trial counsel for the appeal, has been held by the court below to have fallen inescapably into the springes of Federal criminal appellate procedure. We had thought the clear and simple Criminal Appeals Rules had no springes in

them, and yet they have been here held to require the stringent penalty of dismissal of the appeal because the accurate, timely bill of exceptions, consisting solely of relevant matter, is not in narrative and condensed form. The requirement as to narration and condensation is not one with which an appellant, however able and diligent, can comply without the active cooperation of the courts and of opposing counsel. The courts below have shown every disposition to aid petitioner—relief being ultimately denied him because of a mistaken view by the Circuit Court of Appeals of its own powers. As to counsel for the Government in the court below, the least that can be said is that this record evinces no willingness on their part to cooperate in the perfecting and hearing of the appeal.

Without active cooperation from opposing counsel, an appellant under existing Federal appellate procedure is at extreme disadvantage in getting a bill of exceptions narrated, condensed, and settled. While it is perhaps understandable why many judges simply will not, and in many cases cannot, undertake to settle a narrative form bill of exceptions upon which counsel have not agreed, nevertheless the situation is one which gives the appellee the whip hand. In this situation, any finding that appellant had been guilty of *laches* (and none is made here) would take a strong showing, and would also entail inquiry into the conduct of opposing counsel.

These considerations, among others, no doubt supply the reason why the narration requirement has been disapproved in at least 42 States, as reported to this Court recently by its Advisory Committee on Civil Rules (pp. 135, *et seq.*). It is also of interest to note that that Committee has recommended to this Court that the narration requirement be abolished in the Federal appellate practice as well, since its advantages "are more than outweighed by the delays in preparing the narrative form, and the heavy bur-

den and expense on litigants and lawyers in preparing and settling and agreeing upon narrative statements." (Report, p. XV.)

We admit, of course, that the narrative requirement is the present law, and that no issue is here involved as to its abolition. But what we have just said, and what we have just quoted, establish, we submit, that an appellant in the position of this petitioner cannot be held to have voluntarily thrown away his right of appeal by failing to accomplish something the doing of which was within the control of the other side of the case. We do not believe that the opinion of the court below can properly be read as holding that he has done so. The ruling below is based on want of power.

Respectfully submitted,

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FILE COPY

No. 604

In the Supreme Court of the United States

OCTOBER TERM, 1938

REGINALD P. RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals on petition for rehearing (R. 29–31) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered December 4, 1936 (R. 18). A petition for rehearing and motions for re-argument (R. 19–29) were denied December 22, 1936 (R. 29–32). The petition for writ of certiorari was filed December 29, 1936. While the petitioner does not so state, he presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code and

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.[1]

QUESTIONS PRESENTED

Although the petitioner in his 35-page petition suggests a number of questions involving the interpretation of various portions of the Criminal Appeals Rules, the decisive question, we submit, is whether the bill of exceptions in this case was settled and filed within the time prescribed by the order of the District Judge of July 27, 1936.

This order, which was entered within 30 days after the taking of the appeal, as permitted by Rule IX of the Criminal Appeals Rules, extended the time for filing the bill of exceptions "to and including the 1st day of November, 1936," which was a Sunday. The bill of exceptions was not settled and filed until Monday, November 2.

RULES INVOLVED

The pertinent portions of the Criminal Appeals Rules, and Rule 8, paragraph 2, of the general Rules of this Court are printed in the Appendix, *infra*, pp. 17–19.

STATEMENT

As the question presented, as we view it, is a narrow one, we deem it necessary to present merely

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[1] As these Rules are referred to in the petition for writ of certiorari as the "Criminal Appeals Rules", they are for convenience so referred to herein.

a brief summary of what seems to us to be the material facts.[1]

On June 26, 1936, the petitioner was convicted on the verdict of a jury of a violation of the mail fraud statute and of conspiracy (R. 4, 7). He was sentenced to imprisonment for two years on June 29, 1936 (R. 5, 7). On June 30, 1936, he filed a notice of appeal to the Circuit Court of Appeals for the Second Circuit (R. 8). On July 27, 1936,

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[1] The petition for writ of certiorari is based in large measure upon statements contained in an affidavit by the petitioner in support of a petition for rehearing filed in the Circuit Court of Appeals. (R. 19–28.) It is said in the petition for writ of certiorari that these statements were "uncontradicted" (pp. 7, 8), "not controverted by the Government" (p. 12), and "undisputed" (p. 15). While present counsel for the petitioner was of course unaware of the fact, this office is advised by a letter dated January 16, 1937, from counsel who represented the Government in the litigation in the courts below, that:

"The fact is that no opportunity was given to the Government to contradict, controvert or dispute the statements in the petition. It was presented ex parte, without notice to the Government. No copy of the petition has been served on the Government counsel in charge of the matter to this day. The first knowledge that I had that an application had been made for a rehearing was the notice from the Clerk of the Circuit Court of Appeals on December 24, 1936, that the rehearing had been denied."

So far as the petition for writ of certiorari indicates that the Government, through alleged lack of cooperation with the petitioner, was in any way responsible for the failure of the petitioner to obtain a proper bill of exceptions, it would seem sufficient to quote the following from the unanimous opinion of the Circuit Court of Appeals (R. 31):

"This appellant had four months and has offered insufficient excuses for his delinquency. The bill of exceptions was insufficient."

within 30 days after the taking of the appeal, he obtained, as permitted by Rule IX of the Criminal Appeals Rules (*infra*, p. 17), an order from the District Judge extending the time to file his bill of exceptions "to and including the 1st day of November, 1936" (R. 15).

The petition for rehearing in the Circuit Court of Appeals alleges, in substance, that thereafter, on October 20, 1936, when it was apparent that condensation or reduction of the bill of exceptions to narrative form, as required by Rule IX of the Criminal Appeals Rules and Rule 8, par. 2, of the General Rules of this Court (*infra*, pp. 18–19), could not be completed within the time previously allowed for the filing of the bill of exceptions, he applied to the trial judge for an order further extending the time to settle and file the bill of exceptions; that investigation indicated that there were decisions that the trial court was without power to grant the extension, as the 30-day period following the taking of the appeal had elapsed, and that the Circuit Court of Appeals was likewise without power to grant an extension (R. 21–22);[1] that in these cir-

[1] Insofar as the petition for writ of certiorari attempts to raise the question of the power of the trial judge under Rule IX of the Criminal Appeals Rules to grant an extension of time for the filing of a bill of exceptions after thirty days from the taking of an appeal has expired (Pet. p. 20), it is evident that the petitioner is not in a position to raise this question as the record does not disclose that any order was entered by the trial judge in connection with the petitioner's application on October 20, 1936, for an extension of time to file the bill of exceptions. Even if the question had been

cumstances the petitioner, finding it impossible within the remaining time before November 1st to complete the condensation of the bill of exceptions, applied on October 22, 1936, to the Circuit Court of Appeals for an order modifying the order made by the District Judge on July 27, 1936, so as to enlarge the original period of extension; that at the argument on the motion on October 27, 1936, the petitioner took the position that the Circuit Court of Appeals had power to enter such an order under those portions of Rule IV of the Criminal Appeals Rules which provide that the appellate court "shall have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal", and that "The appellate court may at any time, upon five (5) days' notice, entertain a motion * * * to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the

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properly raised, it is clearly without merit. *Spero* v. *United States*, 85 F. (2d) 134, certiorari denied November 23, 1936 (No. 466 present term). No conflict was established by the decision in *Fierman* v. *United States*, 84 F. (2d) 948 (C. C. A. 3d), to which the petitioner refers. As is pointed out by the Government in its brief in opposition in the cases of *Oary* and *Williams* v. *United States*, Nos. 592 and 593, present term, now pending, the bill of exceptions in the *Fierman* case was out of time even under the practice obtaining prior to the promulgation of Rule IX of the Criminal Appeals Rules. Any suggestion in the opinion in the *Fierman* case of a holding that Rule IX permits a trial judge to grant an extension of time for the filing of a bill of exceptions after thirty days have elapsed from the taking of an appeal was clearly dictum and not an adjudication to that effect.

appeal, * * *"; that the court said, among other things, that "it did not consider Rule IV broad enough to grant the relief sought and thereupon unanimously suggested as a compromise measure that, under the circumstances of my case, in order to avoid any jurisdictional question, an application be made to the trial judge for an order settling the typewritten stenographer's minutes of the trial as the bill of exceptions and that thereafter an application might be made to this court for time to prepare, agree upon, and print the condensed record under Rule IX, in Criminal Cases, which provides: 'The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.'" (R. 22–23.)[4]

The petitioner does not assert that any order was entered by the Circuit Court of Appeals in connec-

[4] While the petitioner in the petition for rehearing (R. 22) states that he sought relief from the Circuit Court of Appeals because he found it impossible to complete the condensation of the bill of exceptions within the time which remained before November 1st, an attorney who assisted him in connection with the appeal to the Circuit Court of Appeals states in an affidavit attached to the petition for writ of certiorari (p. 39) that "Your deponent further states that on October 27, 1936, when the Circuit Court of Appeals suggested the procedure finally adopted, it was stated to that court, in response to its question, that so far as the petitioner was concerned a narration and condensation for settlement could be completed within the time still remaining."

tion with the proceeding just referred to, and the clear inference from the petition for rehearing is that no order was entered.[5]

The petition for rehearing then goes on to allege that in pursuance of the suggestion of the Circuit Court of Appeals and after some preliminary efforts in the District Court, the trial judge on Monday, November 2, over the objection of Government counsel, settled the stenographer's minutes of the trial, as condensed by the elimination of 700 pages involving colloquy of counsel, as the bill of exceptions, and that the bill was filed with the Clerk of the District Court on the same day (R. 23–25; see also 15–16).[6] On November 12, 1936, the Govern-

[5] As no order was entered by the Circuit Court of Appeals in connection with the petitioner's effort to secure a modification under Rule IV of the Criminal Appeals Rules of the order of the District Judge of July 27, 1936, so as to enlarge the time for filing the bill of exceptions, there is obviously no basis for review in this Court of the question raised in the petition for writ of certiorari (p. 21) as to the power of the Circuit Court of Appeals under Rule IV to modify a timely order of extension for the filing of a bill of exceptions by the trial judge by lengthening the extension. It may also be pointed out that in *United States* v. *Adamowicz*, 82 F. (2d) 288 (C. C. A. 2d), certiorari denied 298 U. S. 664, the power of a judge of the Circuit Court of Appeals to grant an extension of time for the filing of a bill of exceptions was attempted to be supported in this Court under Rule IV of the Criminal Appeals Rules.

[6] In an affidavit filed by the Government in the Circuit Court of Appeals in support of a motion to docket and dismiss the appeal, it is stated that on November 2, 1936, the appellant presented to the trial judge 5 volumes of the typewritten stenographic minutes of the trial, with colloquy of

ment filed in the Circuit Court of Appeals a motion to docket and dismiss the appeal (R. 11–16).[1] Simultaneously there appears to have been filed in the Circuit Court of Appeals a motion by the petitioner to correct the record (R. 30). This motion is not set out in the record, but its purpose apparently was to permit the reduction of the bill of exceptions to narrative form as required by the Rules of this Court (Rule IX of the Criminal Appeals Rules; Rule 8, par. 2, of the General Rules), the theory being that the Circuit Court of Appeals had this power under the provision of Rule IX of the Criminal Appeals Rules which permits the appellate

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counsel omitted, and two volumes containing the summation of the prosecuting attorney and the charge of the trial court and other proceedings after the trial, consisting of 3,981 pages in all, and requested that they be settled and signed as the bill of exceptions in the case; that this motion was granted; that the Government opposed the granting of the motion on the grounds, among others, that the proposed bill of exceptions was not in narrative form as required by the Rules of this Court (Rule IX of the Criminal Appeals Rules; Rule 8, par. 2 of the General Rules), although the appellant had had the minutes of the trial in his possession for four months; and that the District Judge was without power on November 2, 1936, to sign the bill of exceptions, inasmuch as the extended time under the order of July 27, 1936, had expired on November 1, 1936 (R. 13–14).

[1] While, as the petitioner suggests, a motion to docket and dismiss was not the proper procedure under the Criminal Appeals Rules, the petitioner does not deny that it was competent for the Circuit Court of Appeals to regard the motion as a motion filed under paragraph 3 of Rule IV of the Criminal Appeals Rules (*infra*, p. 17) to dismiss the appeal because of jurisdictional defects. (Pet. pp. 18–19).

court on motion by either party to correct, amplify or reduce the record filed with the appellate court or to issue directions to the trial court with relation thereto. On December 22, 1936, the court denied this petition, which it considered as a motion for re-argument of the motions to correct the record and to dismiss the appeal (R. 29–32). In its *per curiam* decision the Circuit Court of Appeals held that as the trial judge's order extending the time for filing of bill of exceptions expired on a Sunday (November 1, 1936), the settlement and filing of bill of exceptions on the following Monday were in time under Rule XIII of the Criminal Appeals Rules (*infra*, p. 18). The court held, however, that it had no power under Rule IX of the Criminal Appeals Rules to itself permit the reduction of the bill of exceptions to narrative form or to transmit the bill of exceptions to the trial court for that purpose for the reasons that while it could correct a record so as properly to reflect the proceedings in the District Court by adding papers not certified by the clerk or striking out some which may not be necessary, and while it could of course correct its own record if it is not stated properly, "the bill of exceptions * * * is determined and settled by the district judge alone and we may not correct or change it"; that it could not remit the bill of exceptions to the trial judge for reduction to narrative form because Rule IX of the Criminal Appeals Rules imposes a time limit upon the settle-

ment of the bill of exceptions which could not be enlarged, in consequence of which, if the bill of exceptions were remitted to the trial judge, he would be powerless to correct, amend or resettle it as the time to do so had expired; that its only power under the circumstances was to strike out the bill of exceptions for non-compliance with the rules of this Court requiring the bill of exceptions to be reduced to narrative form. It added that the petitioner had had four months within which to prepare a proper bill of exceptions and had offered no sufficient excuse for his delinquency. (R. 29–31.)

ARGUMENT

While we believe that the Circuit Court of Appeals was correct in holding in this case that it had no power under Rule IX of the Criminal Appeals Rules, after the time for filing the bill of exceptions had expired, to permit, or to direct the District Judge to permit, the reduction of the bill to narrative form, as this would set at naught the time limitation imposed upon the filing of bills of exceptions by Rule IX, we submit that the decision of the Circuit Court of Appeals can be supported upon a ground as to which there is even less question.

The only order extending the petitioner's time for filing his bill of exceptions entered by the trial judge was that of July 27, 1936. This order, which was entered within thirty days after the taking of the appeal, as permitted by Rule IX, ex-

tended the petitioner's time for filing his bill of exceptions "to and including the 1st day of November, 1936" (R. 15). The bill of exceptions was not settled and filed until November 2, 1936, (R. 15–16).

The Circuit Court of Appeals, without the citation of any authority, held (R. 30) that the settlement and filing of the bill of exceptions on November 2, 1936, was in time because the last day of the extension for such purpose, November 1, fell on a Sunday. It reached this conclusion because of the provision of Rule XIII of the Criminal Appeals Rules that:

> For the purpose of computing time as specified in the foregoing rules, *Sundays* and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded. (Italics ours.)

In so holding we think it is obvious that the court was in error. Rule XIII expressly provides that Sundays and legal holidays are to be excluded "for the purpose of computing time as specified in the foregoing rules." It is evident therefore that Sundays and legal holidays are to be excluded only where it is necessary to compute time under the prior provisions of the Rules. By reference to the Rules it will be seen that certain periods of time, measured in days, were fixed for the doing of certain acts. For example, an appeal must be taken by a defendant "within five days" (Rule III); the bill of exceptions must be filed "within thirty days"

after the taking of the appeal, unless an extension is granted by the trial judge within that period (Rule IX); a petition for writ of certiorari must be filed in this Court "within thirty days" after the entry of the judgment below. (Rule XI.) Prior to the promulgation of the Criminal Appeals Rules the Federal courts had uniformly held that where certain periods of time, measured in months or days, were fixed for the taking of appeals, or the filing of petitions for writs of certiorari or bills of exceptions, and the last day of such period fell on a Sunday, or a legal holiday, action on the following [redacted]day was too late. *Gotham Can Co.* v. *United States,* 281 U. S. 706; *Maresca* v. *United States,* 277 Fed. 727, 733 (C. C. A. 2d), certiorari denied, 257 U. S. 657; *Siegelschiffer* v. *Penn-Mut. Life Ins. Co.,* 248 Fed. 226 (C. C. A. 2d), (see also *Ex parte Siegelschiffer,* 246 U. S. 654); *Walters* v. *Baltimore & O. R. Co.,* 76 F. (2d) 599 (C. C. A. 3d); *Larkin Packer Co.* v. *Hinderliter Tool Co.,* 60 F. (2d) 491, 493 (C. C. A. 10th); *Northwestern Public Service Co.* v. *Pheiffer,* 36 F. (2d) 5 (C. C. A. 8th); *Johnson* v. *Meyers,* 54 Fed. 417 (C. C. A. 8th); *Meyer* v. *Hot Springs Imp. Co.,* 169 Fed. 628 (C. C. A. 9th). It was undoubtedly to prevent the application of these decisions in computing the various time limits prescribed in the Criminal Appeals Rules, as well as to permit the exclusion of intervening Sundays and legal holidays in such computation, that the provision was inserted in Rule XIII upon which the court below relied.

While it would undoubtedly follow that by virtue of this provision of Rule XIII Sundays and legal holidays would be excluded in the computation of the time for filing a bill of exceptions where the trial judge pursuant to the authority contained in Rule IX grants an extension, within thirty days after the taking of the appeal, of a certain number of days or months for the filing of the bill of exceptions (cf. *Yep* v. *United States*, 83 F. (2d) 41, 42 (C. C. A. 10th)), it is apparent that we do not have such a situation presented here. In the instance cited the trial judge must be presumed to have acted in the light of the provision of Rule XIII excluding Sundays and legal holidays in computing time, but in the present case the order of the trial judge expressly extended the time for filing the bill of exceptions "to and including the 1st day of November, 1936." This order was clear and unambiguous and it is apparent that the trial judge at the time it was entered intended that the bill of exceptions should be settled and filed by November 1, 1936, and not afterwards. The order needs no construction and it involves no computation of time. Under this order there is no more reason to exclude the last Sunday than any of the intervening Sundays and legal holidays during the period of the extension. We submit, therefore, that where, as in this case, the trial judge by his order of extension has fixed the last day beyond which the settling and filing of a bill of exceptions will not be allowed, the fact that the last day falls on

a Sunday does not permit the settling and filing of the bill of exceptions on a Monday. Cf. *Maresca* v. *United States*, 277 Fed. 727, 732–733 (C. C. A. 2d), *supra*, in which this Court denied a petition for writ of certiorari, 257 U. S. 657. The principle is well illustrated by the decision of the Supreme Court of Massachusetts in *Cooney* v. *Burt*, 123 Mass. 579, in which it was said:

> The question presented does not depend upon the rules which govern the computation of time when the last of a certain number of days allowed by statute or by general rule of court happens to fall on a Sunday or other legal holiday; but upon the construction of the special order made by the judge in this case, which did not define the time by the number of days, but by a particular date, and, as stated in his certificate, was that "the time for filing and presentment of these exceptions was extended by the court to April 12," and clearly did not allow them to be presented to him after that day. * * *
>
> *Exceptions dismissed.*

If, as we submit, the bill of exceptions was filed out of time, it was clearly a nullity and the Circuit Court of Appeals was obviously without power under Rule IX or otherwise to allow its correction or amendment by reduction to narrative form. Cf. *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 298; *Exporters Co.* v. *Butterworth Judson Co.*, 258 U. S. 365, 367.

Some point is made in the petition for writ of certiorari that the Circuit Court of Appeals should not have dismissed the appeal on account of the defect in the bill of exceptions because it did not have the assignment of errors before it and was consequently not in a position to know whether there were questions arising on the record proper which it should consider. While the grounds for appeal included in the petitioner's notice of appeal raise questions as to the denial of a motion to dismiss the indictment and a motion in arrest of judgment (R. 9), petitioner expressly states that he "does not suggest" that the assignment of errors included any going to the record proper (Pet. p. 14). And no such suggestion was made to the Circuit Court of Appeals in the petition for rehearing (R. 19–27). While examination of a copy of the assignment of errors filed by the petitioner in the District Court discloses that one of them alleged that "47. The Court erred in denying the motions made on behalf of the defendant Ray to set aside the verdict and grant a new trial, and in arrest of judgment (s. m. p. 3970)," none of these motions have been incorporated in the transcript of record in this Court, and it therefore cannot be determined on this record whether any of these motions presented questions arising on the record proper or whether they were confined to matters occurring at the trial. The burden is, of course, upon the petitioner to establish that he was prejudiced because the Cir-

cuit Court of Appeals dismissed the appeal instead of merely striking out the bill of exceptions.

CONCLUSION

The controlling question in this case is not of general public importance and involves no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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WILLIAM W. BARBOUR,
W. MARVIN SMITH,
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JANUARY 1937.

APPENDIX

Rules IV and IX of the Criminal Appeals Rules are as follows:

IV. *Control by Appellate Court.*—The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

IX. *Bill of Exceptions.*—In cases other than those described in Rule VIII,[1] the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill

[1] Rule VIII is not here material, as it covers appeals which are prosecuted without bills of exceptions.

of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

The pertinent portion of Rule XIII of the Criminal Appeals Rules is as follows:

> For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Rule 8, paragraph 2 of the general rules of this Court provides as follows:

> Only so much of the evidence shall be embraced in a bill of exceptions as may be

necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570.

U. S. GOVERNMENT PRINTING OFFICE: 1937

No. 604

In the Supreme Court of the United States

October Term, 1936

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v.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 604

REGINALD P. RAY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals on petition for rehearing and motions for reargument (R. 29–31) is reported in 86 F. (2d) 942.

JURISDICTION

The judgment sought to be reviewed was entered December 4, 1936 (R. 18). A petition for rehearing and motion for reargument (R. 19–28) were denied on December 22, 1936 (R. 29–32). The petition for a writ of certiorari was filed December 29, 1936, and was granted February 8, 1937.

(R. 32). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.[1]

QUESTIONS PRESENTED

1. Whether under Rules IX and XIII of the Criminal Appeals Rules a bill of exceptions filed on November 2, 1936, was filed within the time prescribed by an order of the trial court extending the time for filing such bill to and including November 1, 1936, which was a Sunday.

2. Whether a trial judge has the power under Rule IX of the Criminal Appeals Rules to extend the time for settling and filing a bill of exceptions by an order not entered within thirty days after the taking of the appeal.[1a]

3. Whether the Circuit Court of Appeals has the power under Rules IV and IX of the Criminal Appeals Rules to modify a timely order by a trial judge extending the time for settling and filing the the bill of exceptions by extending the length of the extension.[1a]

4. Whether, where a trial judge has directed the settling and filing of a bill of exceptions which does not comply with the requirements of Rule IX

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[1] As these rules are referred to in the brief for the petitioner as the "Criminal Appeals Rules", they are for convenience so referred to herein.

[1a] While these questions are not discussed in petitioner's brief on the merits, they were considered at length in the petition for writ of certiorari (pp. 20–23).

of the Criminal Appeals Rules and Rule 8 of the General Rules of this Court as to condensation and narration of the evidence, the Circuit Court of Appeals has the discretionary power under paragraph four of Rule IX of the Criminal Appeals Rules, after the time for settling and filing the bill of exceptions has expired, to allow the condensation and narration to be made and filed in that court, or to remit the transcript of record to the trial court for the purpose of permitting such condensation and narration.

5. Whether, assuming that the Circuit Court of Appeals has such power, it abused its discretion in the instant case by dismissing the appeal for want of narration and condensation of the evidence contained in the bill of exceptions.

STATEMENT

On June 26, 1936, the petitioner was convicted on the verdict of a jury, along with other defendants, for a violation of the mail fraud and conspiracy statutes (R. 4). On June 29 he was sentenced (R. 5), and on June 30 he filed a notice of appeal (R. 6). On July 27, by order of the trial judge, his time for filing and serving his assignment of errors and bill of exceptions was extended "to and including the 1st day of November, 1936" (R. 15).

In the latter part of September, 1936, 600 pages of the 4,000 page stenographer's transcript had been condensed, and by the middle of October a total of 1,600 pages had been condensed (R. 21). On

October 20, petitioner applied to the trial judge for a further order extending the time within which to settle and file the bill of exceptions. Upon suggestion by Government counsel that the trial court had no jurisdiction to make further extension (R. 21) petitioner, apparently convinced of the validity of this position (R. 21–22), did not pursue the matter further, and no order granting or denying the extension was ever entered (R. 17).

On October 22, 1936, the petitioner secured from Judge Manton of the Circuit Court of Appeals for the Second Circuit an order to show cause why an extension should not be granted by the Circuit Court of Appeals (R. 17). On October 27 the motion was argued and the relief sought denied (R. 17). On October 29, 1936, a motion to settle the stenographer's minutes as a bill of exceptions was argued before the trial judge and denied by him, the Government appearing in opposition (R. 17–18). On October 30, the trial judge in an informal conference agreed to receive another application to settle the transcript as a bill of exceptions if colloquy of counsel appearing therein was stricken. On Monday, November 2, a motion was made and granted to settle and file the typewritten minutes as a bill of exceptions, petitioner having in the meantime stricken therefrom with a red pencil the colloquy of counsel. (R. 18.) On November 16, 1936, the Government moved in the Circuit Court of Appeals to docket and dismiss the appeal upon the ground that the petitioner had failed to docket the

case in that court in time and because the bill of exceptions was not settled in compliance with Rule IX, Criminal Appeals Rules (R. 11). The accompanying affidavit stated that the bill of exceptions was ineffective because not in condensed and narrative form and because it had been allowed and settled out of time (R. 14). Thereafter, on December 4, 1936, the Circuit Court of Appeals, without opinion, entered an order dismissing the appeal (R. 18). On December 9 petitioner filed an application for rehearing. (R. 19–28.) That petition was presented *ex parte* without notice to the Government, and no copy of such petition was ever served on the Government counsel. (See Government's Brief in Opposition, p. 3). Petitioner's motion for reargument was denied in a unanimous opinion by the Circuit Court of Appeals, in which it denied the motion to amend the record and granted the motion to dismiss the appeal. (R. 29–32.)

The Circuit Court of Appeals rested its decision principally upon the ground that since Rule IX of the Criminal Appeals Rules imposes a time limit upon the settlement of the bill of exceptions which cannot be enlarged, and since under Rule 8 of the General Rules a bill of exceptions must be reduced to narrative form, there had not been compliance by the appellant with these rules and that the appeal would therefore have to be dismissed. (R. 31.) It stated, in addition, that the appellant had had four months within which to prepare a proper bill

of exceptions and had offered no sufficient excuse for his delinquency (R. 31). The Circuit Court of Appeals passed over the Government's contention that the bill of exceptions had been filed one day late under the order of extension of July 27, stating merely that if the bill had been sufficient its settlement on the day after Sunday would be in compliance with the Criminal Appeals Rules. (R. 30.)

RULES INVOLVED

The pertinent portions of the Criminal Appeals Rules of this Court are as follows:

> IV. *Control by Appellate Court.*—The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.
>
> From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.
>
> The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

IX. *Bill of Exceptions.*—In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the

appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

XIII. In the foregoing rules, the phrase "trial court" shall be deemed to refer to the District Courts of the United States and the Supreme Court of the District of Columbia; the phrase "trial judge" includes the judge before whom the case was tried or brought to judgment and, in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried or brought to judgment; the phrase "appellate court" shall be deemed to refer to the United States Circuit Court of Appeals and the Court of Appeals of the District of Columbia.

For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Rule 8, paragraph 2, of the General Rules of this Court reads as follows:

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth

otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570.

SUMMARY OF ARGUMENT

1. By order of the trial judge the time for settling and filing the bill of exceptions was extended "to and including the first day of November, 1936". The so-called bill of exceptions was settled and filed on November 2, and was therefore not within the time allowed by the trial judge. There is no occasion to apply Rule XIII of the Criminal Appeals Rules, which is a rule for "computing time". No computation of time is necessary where the extension is to a specific date, as distinguished from a term or a number of days. The bill was, therefore, not timely filed.

2. While there is nothing in the record which squarely presents the question, the trial judge does not have the power under Rule IX to extend the time for settling and filing a bill of exceptions unless the order of extension is made within thirty days after the taking of the appeal. This has been the only question presented in three recent cases in which this Court has denied certiorari. See *Spero* v. *United States*, 85 F. (2d) 134 (C. C. A. 8th), certiorari denied Nov. 23, 1936 (No. 466); *Wolpa* v. *United States*, 84 F. (2d) 829 (C. C. A. 8th), certiorari denied Jan. 4, 1937 (Nos. 586, 587); *Cary* v. *United States*, 86 F. (2d) 461 (C. C. A. 9th), certiorari denied Feb. 8, 1937 (Nos. 592, 593).

3. The Circuit Court of Appeals has no power under Rule IX or Rule IV of the Criminal Appeals Rules to modify a timely order by the trial judge extending the time for settling and filing the bill of exceptions by extending the length of the extension. The settlement of the bill of exceptions is expressly confided to the trial court by the first paragraph of Rule IX. While the Circuit Court of Appeals may, in the exercise of its supervisory and appellate control under the above-mentioned rules, correct a record so that it will reflect the proceedings in the District Court by adding papers not certified by the clerk or by striking out some which may not be necessary, it may not usurp the function committed to the trial judge. For the Circuit Court of Appeals to permit the filing of a bill of exceptions beyond the time allowed by Rule IX would be a direct usurpation of a function of the trial judge. Settlement of the bill of exceptions is inherently and historically an act of the trial judge. The Criminal Appeals Rules impose upon this act time limitations. No such limitations are placed upon the Circuit Court of Appeals, and if the petitioner's contention is correct, the time limitations contained in the rules may be completely circumvented.

4. Where, as here, a bill of exceptions does not comply with the requirements of Rule IX of the Criminal Appeals Rules and Rule 8 of the General Rules of the Court as to condensation and narration

of the evidence, the Circuit Court of Appeals has no power under paragraph 4 of Rule IX of the Criminal Appeals Rules, after the time for settling and filing the bill of exceptions has expired, to allow the condensation and narration to be made and filed in that court or to remit the transcript of record to the trial court for the purpose of permitting such condensation and narration. The transcript of the stenographer's minutes is not in any sense a bill of exceptions. Under the rules the trial judge alone may settle and file a bill of exceptions. The Circuit Court of Appeals has no power to usurp the trial judge's function and defeat the object of the condensation rule by rearranging, after the time for filing has expired, the transcript of stenographer's minutes so as to constitute it a bill of exceptions. The case of *Barber Asphalt Company* v. *Standard Asphalt and Rubber Company,* 275 U. S. 372, is not controlling. That was an equity case, and in equity cases such a remission for compliance with Rule 75 is possible, since even the indefinite time limitations for filing a condensed record which prevailed prior to the Criminal Appeals Rules were not applicable in equity cases.

5. Even if it be assumed that the Circuit Court of Appeals has the power to remit the bill of exceptions to the trial court for condensation and narration, or to permit condensation and narration to be made in the Circuit Court of Appeals, it did not abuse its discretion in the instant case by dismissing the appeal for want of such con-

densation and narration. The special circumstances which this Court felt justified it in ordering a remission in the *Barber Asphalt Company* case are not present in the instant case. In that case the Circuit Court of Appeals had been uniformly indulgent concerning compliance with Equity Rule 75, requiring condensation. It had been the common practice to direct that all testimony be reproduced in the words of the witnesses. Then, for the first time, the rule was enforced in the *Barber Asphalt Company* case. This Court ruled that this was too severe a penalty to impose for action which had had the lower court's implied sanction for a long period of years up to that time.

In the instant case no effort was made by the petitioner to condense any of the testimony until approximately three months after the appeal had been noted, and yet by his own admission it would have been possible for him to have condensed the record at approximately five hundred pages a day. The bill of exceptions in this case was four thousand pages long, and the Circuit Court of Appeals correctly concluded that the petitioner had offered "insufficient excuses for his delinquency." There was, therefore, no abuse of discretion.

The action of the Circuit Court of Appeals in dismissing the appeal without having before it the assignment of errors was clearly justified in the absence of a showing by petitioner that there were assignments going to errors on the record proper.

ARGUMENT

I

A BILL OF EXCEPTIONS FILED ON NOVEMBER 2, 1936, IS NOT FILED WITHIN THE TIME PRESCRIBED BY AN ORDER OF THE TRIAL COURT EXTENDING THE TIME FOR FILING SUCH BILL TO AND INCLUDING NOVEMBER 1, 1936, NOTWITHSTANDING NOVEMBER 1, 1936, FELL ON A SUNDAY

The order signed by the trial judge on July 27, 1936, extended the time within which to settle and file the bill of exceptions and the assignment of errors "to and including the first day of November, 1936". (R. 16–17.) The first day of November fell on a Sunday. The Government consequently urged in its affidavit accompanying the motion to docket and dismiss the appeal (R. 13–14) that the trial judge was without power on November 2, 1936 (a Monday), to sign the bill of exceptions inasmuch as the time had expired on the previous day. The Circuit Court of Appeals, however, in its opinion (R. 30) refused to dismiss the appeal on this ground alone because of the provision of Rule XIII of the Criminal Appeals Rules (*supra*, p. 8) excluding Sundays and holidays for the purpose of computing time as specified in such rules.

We submit that this holding of the Circuit Court of Appeals was erroneous for two reasons: (A) Rule XIII, excluding Sundays and holidays, expressly refers to the *computation* of time as specified in the rules and does not permit an inference

that such Sundays or holidays are to be excluded where no computation of time is necessary or proper to ascertain the last date permitted for the doing of the required act; (B) It has never been the rule in the Federal courts, where the last day for settling and filing a bill of exceptions falls on a Sunday, that the act required may be done on the following day.

Rule XIII of the Criminal Appeals Rules provides that "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded". It will be observed that the exclusion of Sundays and legal holidays was to be made only where it was necessary "for the purpose of *computing time as specified in the foregoing rules.*" Thus, Rule II requires that motions for new trial or motions in arrest of judgment shall be made within three days after verdict or finding of guilt. Rule III requires that an appeal be taken within five days after entry of judgment or order denying motion for new trial. Rule IX requires the bill of exceptions to be settled and filed "within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge * * *". And Rule XI requires that a petition for a writ of certiorari shall be filed in this Court within thirty

days after entry of judgment in the court below. It is evident that under these and other provisions of the Criminal Appeals Rules the computation of time becomes necessary and Rule XIII is therefore applicable.

In the instant case there was no necessity for computing time. A specific date was fixed in the order of the trial judge. The situation is, therefore, unlike that in which the order provides that the act to be performed must be done within a period or term, such as within thirty days or sixty days. If Rule XIII has any application to the order here in question it must operate to exclude all intervening Sundays and holidays and to advance the final date for settling the bill of exceptions to approximately November 17, 1936. This startling result was clearly not within the contemplation of either the court or petitioner's counsel, and does violence to the clear, unambiguous language of the order. Unless some other rule intervenes, the plain terms of the order required the settlement of the petitioner's bill of exceptions on or before November 1, 1936, and not thereafter.

Rule XIII is thus unlike certain state statutes [2] which provide that the time within which an act shall be done shall be computed by excluding the

[2] Calif. Civil Code, Sec. 3266c; Ill. Rev. Stat., c. 98, Sec. 216; c. 100, Sec. 6; c. 131, Sec. 1, subd. 11; Mo. Rev. Stat., c. 45, Art. II, Sec. 4160; Consolidated Laws of N. Y., c. 39, Art. 2, Sec. 5.

first day and including the last day but if the last day be a Sunday it shall be excluded.

It may be conceded that if there were any Federal statutes like these or any rule of this Court of similar purport, the petitioner's contention in the instant case would be valid. In the absence of any such provision of Federal law or rule, it seems obvious that the rule established by such state statutes cannot be helpful in deciding the case at bar.

A review of the applicable Federal cases discloses no decisions which sustain the petitioner's contention. These decisions were all rendered prior to the effective date of the Criminal Appeals Rules. By far the greater number of these decisions involve periods of time stated in days or months, the last day of which term fell on a Sunday or legal holiday. These cases have uniformly held that in the computation of time permitted for the taking of an appeal or the filing of a bill of exceptions the last day was not to be excluded because it happened to be a Sunday or legal holiday. *Johnson* v. *Meyers,* 54 Fed. 417 (C. C. A. 8th); *Meyer* v. *Hot Springs Imp. Co.,* 169 Fed. 628 (C. C. A. 9th); *Siegelschiffer* v. *Penn Mutual Life Insurance Co.,* 248 Fed. 226 (C. C. A. 2d); *Covey* v. *Williamson,* 286 Fed. 459 (App. D. C., 1923); *Chicago M. & St. P. Ry. Co.* v. *Leverents,* 19 F. (2d) 915 (C. C. A. 8th); *Northwestern Publice Service Company* v. *Pfeifer,* 36 F. (2d) 5

(C. C. A. 8th). See also *Gotham Can Co.* v. *United States,* 281 U. S. 706. In other words, the act required to be done must be performed within the term allotted, and not thereafter, despite the fact that the concluding day of the period was a Sunday or legal holiday.

These decisions do not deal with exactly the situation here involved. In the instant case the time for filing was set by an order fixing a certain date. Cases involving this point are extremely rare. In the case of *Maresca* v. *United States,* 277 Fed. 727 (C. C. A. 2d), certiorari denied, 257 U. S. 657, the order of the trial court extending the time for filing a bill of exceptions was in the form of an oral statement by the trial judge. It was not clear whether the order was one extending the term until November 1, or whether it was an extension for four months. The Circuit Court of Appeals said in its opinion (p. 732):

> Where time is defined by a particular date as well as by the number of days, and the two are inconsistent, it is very doubtful at the best whether the number of days named can overcome the particular date specified.

The court held that whether the court below extended the term to November 1, or whether it extended it four months, which would have brought it to November 2, which fell on a legal holiday, in either event the subsequent extension of the term, not made until the following day, came too late and

the bill of exceptions thereafter signed must be disregarded.

Support for the principle enunciated in the *Maresco* case is found in the convincing language of the Supreme Court of Massachusetts in the case of *Cooney* v. *Burt*, 123 Mass. 579, in which it was said:

> The question presented does not depend upon the rules which govern the computation of time when the last of a certain number of days allowed by statute or by general rule of court happen to fall on a Sunday or other legal holiday; but upon the construction of the special order made by the judge in this case, which did not define the time by the number of days, but by a particular date, and, as stated in his certificate, was that "the time for filing and presentment of these exceptions was extended by the court to April 12," and clearly did not allow them to be presented to him after that day. [Citing authorities.] *Exceptions dismissed.*

Petitioner strongly relies upon the decision of this Court in *Taylor* v. *United States*, 286 U. S. 1, 4–5. The facts of the *Taylor* case distinguish it from the case at bar. There, as this Court notes on page four of its opinion, the facts surrounding the preparation and signing of the bill were not in dispute. Petitioner's counsel duly lodged it with the United States Attorney. For convenience of the latter's office there were extensions of time to

May 17. On May 16, the Assistant District Attorney, having just completed examination of the bill, went with petitioner's counsel to the judge's chambers to secure his signature. Failing to find him, they agreed to ask his signature on Monday, May 18. On that day, with the express approval of all parties and in pursuance of the earlier agreement, the judge signed the bill.

In holding that the bill of exceptions settled under such exceptional circumstances might be considered as incorporated in the record, this Court used the following significant language:

> In these exceptional circumstances—the facts being undisputed—we think the petitioner is entitled to the benefit of the bill. *And negativing any intent to relax the general rule,* we accept it as adequate and properly incorporated in the record. See *Waldron* v. *Waldron,* 156 U. S. 361, 378. [Italics supplied.]

Furthermore, the *Taylor* case must be read in the light of the rules of court existing at the time that the case was decided, which rules recognized the right of the trial judge to control the time for settling the bill of exceptions by extending the term as many times as he deemed necessary for that purpose. The intolerable delays in criminal proceedings resulting from such extensions of time moved this Court to promulgate Rule IX, the purpose of which was to restrict the virtually unlimited discretion of the trial judge and the indefiniteness of

the time which had existed under the prior practice with reference to the preparation and settlement of bills of exceptions.

II

THE TRIAL JUDGE DOES NOT HAVE POWER UNDER RULE IX OF THE CRIMINAL APPEALS RULES TO EXTEND THE TIME FOR SETTLING AND FILING A BILL OF EXCEPTIONS BY AN ORDER NOT ENTERED WITHIN 30 DAYS AFTER THE TAKING OF THE APPEAL

Petitioner urges (Pet. pp. 20, 21) that this Court settle the question whether the trial judge has power to grant an extension of time for filing and settling the bill of exceptions when such extension is not granted within thirty days after taking the appeal. Petitioner asserts that the Circuit Court of Appeals ruled that the trial judge has no such power.

It is submitted that no such ruling appears in the opinion of the Circuit Court of Appeals. It is further submitted that on the record the question is not now before the Court. Everything in the record indicates that, whatever intention petitioner may have had to seek an application for extension of time from the trial judge, petitioner nevertheless abandoned any effort to secure such extension. The affidavit of petitioner (R. 17) states:

> Upon investigation I ascertained that there were decided cases, in other circuits, construing Supreme Court Rule IX in

criminal cases, holding that a further extension could not be granted under the circumstances of my case. The order allowed by Judge Patterson was, therefore, not entered.

There is therefore nothing in the record which presents this question—a question which has nevertheless been uniformly[1] resolved against petitioner's contention. See *Spero* v. *United States,* 85 F. (2d) 134 (C. C. A. 8th), certiorari denied Nov. 23, 1936 (No. 466, present term); *Wolpa* v. *United States,* 84 F. (2d) 829 (C. C. A. 8th), certiorari denied Jan. 4, 1937 (Nos. 586, 587, present term); *Cary v. United States,* 86 F. (2d) 461 (C. C. A. 9th), certiorari denied Feb. 8, 1937 (Nos. 592, 593, present term); *Yep* v. *United States,* 81 F. (2d) 637 (C. C. A. 10th); *Gallagher* v. *United States,* 82 F. (2d) 721 (C. C. A. 8th); *Cusamano* v. *United States,* 85 F. (2d) 132 (C. C. A. 8th); *Slade* v. *United States,* 85 F. (2d) 786 (C. C. A. 10th). See also *United States* v. *Adamowicz,* 82 F. (2d) 288, certiorari denied, 298 U. S. 664.

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[1] The case of *Fierman* v. *United States,* 84 F. (2d) 968 (C. C. A. 3d), is not, as petitioner urges, in conflict with these decisions. While dicta in that case suggest a contrary holding, the decision is simply that the trial judge may not extend the time for settling and filing the bill of exceptions in a case where seven days had elapsed since the time at which, by an order of extension, the bill was due to be filed.

III

THE CIRCUIT COURT OF APPEALS HAS NO POWER UNDER RULE IX AND RULE IV OF THE CRIMINAL APPEALS RULES TO MODIFY A TIMELY ORDER BY THE TRIAL JUDGE EXTENDING THE TIME FOR SETTLING AND FILING THE BILL OF EXCEPTIONS BY EXTENDING THE LENGTH OF THE EXTENSION

Rule IX expressly vests in "the trial judge" the power to fix the time at which, subject to the specific limitations in the rule, the bill of exceptions must be settled and filed. The text of the rule is clear. *In United States* v. *Adamowicz,* 82 F. (2d) 288 (C. C. A. 2d) certiorari denied, 298 U. S. 664, the Circuit Court of Appeals for the Second Circuit said:

> It is true that the appellants got a series of orders from a judge of *this court* ex parte, extending their time "to file and serve" their bill of exceptions * * * But rule 9 (28 U. S. C. A. following section 723a) prescribes that it must be settled "within thirty days after the taking of the appeal, or within such further time as within said period of thirty (30) days may be fixed by *the trial judge*". The "trial judge" means the judge who tried the case, "or in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried." * * * Judge Moskowitz was not at any time absent or disabled so far as appears, and *only he* had the power to extend the time. [Italics in lines 2 and 17 supplied.]

Likewise, in *Wolpa* v. *United States*, 84 F. (2d) 829, certiorari denied Jan. 4, 1937 (Nos. 586, 587, present term), the court said, referring to Rule IX:

> The rule has the same force and effect as federal statutes [citing cases], and neither *this court* nor the District Court has power to alter or amend it. (Italics supplied.)

Despite the clear language of Rule IX, petitioner nevertheless insists (Pet. pp. 21–23) that the Circuit Court of Appeals by Rule IV of the Criminal Appeals Rules is given power to modify the trial judge's order of extension by extending the length of the extension. Rule IV provides in part as follows:

> From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, *subject to these rules,* have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.
>
> The appellate court may at any time, upon five (5) days notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail. [Italics supplied.]

Rule IV, on its face, is a general rule relating to the supervision and control of proceedings on appeal, but the extent of the control is expressly

made "subject to these rules". The nature of the control which the Circuit Court of Appeals shall exercise with reference to the "record on appeal" which is the specific subject matter here involved, is described in the last paragraph of Rule IX, which provides as follows:

> The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court, and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

But the settlement of a bill of exceptions is expressly confided to the trial judge by the first paragraph of Rule IX. And *his* power is severely limited in several respects. *He* may not give *any* extension of time "that is not required in the interest of justice". And at all events "the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days *may be fixed by the trial judge,* shall procure to be settled, and shall file with the clerk of *the court in which the case was tried,* a bill of exceptions * * *" (italics supplied). Such bill of exceptions "*shall conform* to the provisions of Rule 8 of the Rules of the Supreme Court of the United States" (italics supplied).

It is clear that under Rules IV and IX the Circuit Court of Appeals has the power, as the court below pointed out (R. 31), to correct a record so

that it will properly reflect the proceedings in the District Court, by adding papers not certified by the clerk or striking out some which may not be necessary. The Circuit Court of Appeals could, under Rule IV or Rule IX, order the inclusion of the indictment, assignment of errors, notice of appeal, motions, orders, or other matters constituting the record proper, where any such have been omitted from the transcript of the record on appeal. It may even be conceded that under Rules IV and IX the Circuit Court of Appeals could require the elaboration of a bill of exceptions where such bill of exceptions had been timely filed and had been reduced to condensed and narrative form in accordance with the Rules of this Court. Thus the Circuit Court of Appeals might desire that certain portions of a timely bill of exceptions, settled in narrative form, be restated in question and answer form. In such a case the Circuit Court of Appeals would be exercising its supervisory appellate control on a matter as to which there had already been compliance in the trial court with the Criminal Appeals Rules. In such a case the Circuit Court of Appeals would not be usurping the function committed to the trial judge by the first paragraph of Rule IX.

It is significant that petitioner can point to no case, either before or after the Criminal Appeals Rules, in which the power of the Circuit Court of Appeals to extend the time in which the bill of exceptions shall be settled and filed is recognized.

The interpretation of the rules here insisted upon by the Government is in accordance with the well-recognized principle that the settling of a bill of exceptions is inherently and historically the personal act of the trial judge.

IV

THE CIRCUIT COURT OF APPEALS HAS NO POWER UNDER PARAGRAPH 4 OF RULE IX OF THE CRIMINAL APPEALS RULES, AFTER THE TIME FOR SETTLING AND FILING THE BILL OF EXCEPTIONS HAS EXPIRED, TO ALLOW THE CONDENSATION AND NARRATION TO BE MADE AND FILED IN THAT COURT, OR TO REMIT THE TRANSCRIPT OF RECORD TO THE TRIAL COURT FOR THE PURPOSE OF PERMITTING SUCH CONDENSATION AND NARRATION

Paragraph 2 of Rule IX of the Criminal Appeals Rules requires that bills of exceptions shall conform to the provisions of Rule 8 of the general Rules of this Court. Rule 8 provides with reference to bills of exceptions that "such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise".

In *Gallagher* v. *United States*, 82 F. (2d) 721, 722 (C. C. A. 8th), the court said:

> The object and purpose of the grant of power by the Congress to the Supreme Court to make the rules, and the purpose and intent of the rules themselves, were to expedite the hearing of criminal cases on appeal, and in our opinion it is the plain duty of the courts to enforce these rules. For if this

duty is not done by the courts, the passage of the statute and the adoption of the rules will have been vain and futile acts.

The requirement with reference to narration and condensation was the result of a long and painful experience by appellate courts in reviewing records which often consisted of thousands of pages of testimony. See *McNamara* v. *Cerf*, 4 F. (2d) 997, (C. C. A. 2d); *Allen Gasoline Co.* v. *Franklin Fire Ins. Co. of Philadelphia*, 65 F. (2d) 609 (C. C. A. 9th); *Rosen* v. *United States*, 271 Fed. 651, (C. C. A. 2d); *Fraina* v. *United States*, 255 Fed. 28, (C. C. A. 2d); *Chicago* v. *LeMoyne*, 119 Fed. 662, (C. C. A. 7th); *Linn* v. *United States*, 251 Fed. 476, (C. C. A. 2d).

This case is a typical illustration of the abuse which the court rules were designed to correct. The bill of exceptions approved by the trial judge consisted of 3981 pages (R. 16).

It is the Government's position that the Circuit Court of Appeals has no power to circumvent the requirement of Rule 8. The petitioner does not contend that it is within the discretion of the Circuit Court of Appeals to review a record of which the bill of exceptions is not reduced to narrative form. It is his contention that the Circuit Court of Appeals has the power to order such record reduced to narrative form or to remit the bill to the trial court for such reduction. If this power of the Circuit Court of Appeals be conceded, the adoption

of the rule relating to condensation will have been a vain and futile act. For, while the trial court under the Criminal Appeals Rules has placed upon it definite time limitations within which a bill of exceptions in condensed and narrative form must be settled, there are no such limitations on the Circuit Courts of Appeals. While the court below recognized that in exceptional circumstances in equity cases the record could be remitted by the appellate court to the trial court for narration and condensation, it pointed out that under the Criminal Appeals Rules such a practice was not permitted, since these rules impose a time limit for the settlement of the bill of exceptions which cannot be enlarged.

Prior to the Criminal Appeals Rules there was no specific time limit upon the power of the trial court to allow and settle a bill of exceptions. As the petitioner admits (Pet. p. 25), formerly the trial judge might allow and settle a bill of exceptions at any time within the term of court at which the judgment was rendered, and the term of court might be extended indefinitely for that purpose by an order of the court or even by a standing rule or consent of the parties. Doubtless the delays resulting from this practice were largely responsible for the time limitations fixed in Rule IX of the Criminal Appeals Rules.

The only case pointed to by the petitioner in which the power of the Circuit Court of Appeals to remit the record for purposes of reduction is ad-

mitted is *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, an equity case. But, as petitioner admits (Pet. pp. 25, 26), definite time limits are not observed in equity cases. In the *Barber Asphalt Company* case, the court said at page 385:

> The second matter is that the term of the District Court at which the decree was entered expired shortly thereafter without any reservation of further time for settling a statement of the evidence. This, it is said, put an end to the district court's power to act under the equity rule [Equity Rule 75]. We think otherwise. Power to act under that rule is not confined to the term at which the decree is rendered, nor to a period allowed during that term. Such a restriction was not recognized in the early practice and is not expressed in the rule. Other rules, such as 69 and 72, show that where a restriction of that nature is intended it is expressed.

The *Barber Asphalt Company* case is, therefore, not authority for the power of the Circuit Court of Appeals to remit a transcript for narration and condensation where the bill of exceptions must be filed within a certain time and that time has lapsed.

Equity Rule 69, referred to in the *Barber Asphalt Company* case, provides that no rehearing shall be granted "after the term at which the final decree of the court shall have been entered and

recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." And Equity Rule 72 provides that "Clerical mistakes in decrees * * * may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court * * *".

Under the Criminal Appeals Rules a time limit somewhat analogous to, although perhaps even more specific than, those contained in Equity Rules 69 and 72, is definitely fixed by Rule IX, which fixes the time in which the bill of exceptions must be settled and filed. Even prior to the Criminal Appeals Rules it was the ordinary practice of the Circuit Courts of Appeals to refuse to consider a case where the so-called bill of exceptions consisted entirely of a literal transcript of all the proceedings at the trial. See, for example, the cases in the Tenth Circuit of *Davis* v. *United States,* 38 F. (2d) 631; *Smith* v. *United States,* 38 F. (2d) 632; *Flowers* v. *United States,* 38 F. (2d) 633; *Imrie* v. *United States,* 38 F. (2d) 634; *Oldham* v. *United States,* 38 F. (2d) 634; *McShann* v. *United States,* 38 F. (2d) 635.

The Act of February 24, 1933, c. 119, 47 Stat. 904, U. S. C., Title 28, Section 723 (a), vested in this Court authority to prescribe, from time to time, rules of practice and procedure with respect

to proceedings in criminal cases after verdict and further provided that this Court "may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force".

It will be noted that this statute for the first time delegated to the Court authority to enact rules inconsistent with statute. Prior to that time the statute (U. S. C., Title 28, Section 723) expressly restricted the power of the courts, including the Supreme Court, to make rules for proceedings in equity and admiralty, by the condition that they should not be inconsistent with the laws of the United States. It will further be noted that by the Act of June 19, 1934, U. S. C., Title 28, Section 723 (b), 723 (c), this Court is now given power with respect to rules in actions at law and cases in equity which seems equally as broad as the power to prescribe rules for criminal cases after verdict. In other words, the laws in conflict with the new rules are of no further force and effect.

The case of *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, was decided under Equity Rule 75b, which was promulgated in 1912 by virtue of the authority of R. S., Secs. 913, 917 (U. S. C., Title 28, Secs. 723, 730). The Court, at page 386, notes that:

> * * * The requirement respecting condensation and narration was not drawn

> from the earlier practice but was new. Its enforcement was slowly approached. For a time transgression was indulgently overlooked. Then this Court and some of the Circuit Courts of Appeals, having called special attention to the requirement, began to give effect to it. The Court of Appeals for the Seventh Circuit continued to be uniformly indulgent until it came to decide this case.

In that case this Court held that in view of the indulgence theretofore extended to litigants in ignoring the requirement of Equity Rule 75b, it was an abuse of discretion on the part of the Circuit Court of Appeals to impose the severe penalty of affirmance in view of the particular situation in that circuit and in view of the particular facts of that case. That rule was and is a mere rule of court. Its promulgation had no effect to amend or repeal existing statutes since by the statute authorizing it, it was not permitted to contravene the laws of the United States.

But a rule of the Court which has by statute the effect of superseding, amending, or repealing statutory law should, it seems, be of the same grade and dignity as the statute. It therefore follows that the Circuit Court of Appeals is without power to disregard the provisions of such a rule.

There has been a uniform tendency on the part of the trial courts and Circuit Courts of Appeals to regard the Criminal Appeals Rules as having

the binding force and effect of statutes. This view would permit no substantial departure from the requirements of any particular rule.

It must be noted that the Criminal Appeals Rules have received much more prompt acceptance than did the equity rules involved in the *Barber Asphalt* case. In that case fifteen years after the promulgation of the rule it was customarily disregarded in at least one circuit. The Criminal Appeals Rules effective on September 1, 1934, have since that time uniformly been accepted by the courts as meaning what they said. No case has been presented in which the Circuit Court of Appeals has shown any disposition or desire to relax the requirements of the rules. It would be most unfortunate if any such desire or tendency appeared.

The transcript of the stenographer's minutes filed in this case was not a bill of exceptions under the requirements of Rule 8 of the General Rules of this Court. The matter therefore becomes jurisdictional, and in view of the requirements of the Criminal Appeals Rules, which clearly indicate that the trial judge and the trial judge alone may settle and file the bill of exceptions, the Circuit Court of Appeals has no power to usurp the trial judge's function; defeat the object of the rule, which was to secure a speedy disposition of criminal cases; and rearrange the transcript of the stenographer's minutes so as to constitute it a bill of exceptions.

V

ASSUMING THAT THE CIRCUIT COURT OF APPEALS HAS THE POWER DISCUSSED IN THE PRECEDING POINT, IT DID NOT ABUSE ITS DISCRETION IN THE INSTANT CASE BY DISMISSING THE APPEAL FOR WANT OF NARRATION AND CONDENSATION OF THE EVIDENCE CONTAINED IN THE BILL OF EXCEPTIONS

It is clear from the language of the opinion below that the court was of the opinion that, even though it had the power to order the bill of exceptions reduced to condensed and narrative form, the exercise of such a power in the instant case would not be justified. The court states (R. 31):

> This appellant had four months and has offered insufficient exeuses for his delinquency.

Petitioner insists that the action of the Circuit Court of Appeals constituted a patent abuse of discretion, and in this connection relies upon *Barber Asphalt Co.* v. *Standard Asphalt and Rubber Co., supra.* In that case this Court held that the refusal of the Circuit Court of Appeals to remit the transcript in order to have it reduced to narrative form was an abuse of its discretion. The reason for the decision, however, is made plain by the language of the Court at page 386, where it said:

> We come then to the circumstances bearing on the question of discretion. The rule was promulgated in 1912. The requirement respecting condensation and narration was not drawn from the earlier practice but was

> new. Its enforcement was slowly approached. For a time transgression was indulgently overlooked. * * * The Court of Appeals for the Seventh Circuit continued to be uniformly indulgent until it came to decide this case. There may have been some scolding before, but not in the court's opinions. It was a common practice in that circuit for the judges, circuit as well as district, to direct that all the testimony be reproduced in the words of the witnesses. In so directing in this case the district court followed that practice. Of course the practice was in contravention of the equity rule and the Court of Appeals was right in giving effect to the rule by declining to examine the mass of evidence wrongly reproduced. But the court did not stop there. It also affirmed the decree, because of the transgression—and this notwithstanding the transgression was largely due to its own course of action. That was a very severe penalty to impose for action which had the court's implied sanction up to that time. * * * When the particular situation in the Seventh Circuit is considered, we think it is apparent that the Court of Appeals passed the bounds of a sound discretion in affirming the decree. * * *.

In this case we have an entirely different situation. In the Second Circuit, not only has there been "some scolding before", but that scolding has been "in the court's opinions." See *Linn* v. *United States,* 251 Fed. 476; *Fraina* v. *United*

States, 255 Fed. 28; *Rosen* v. *United States,* 271 Fed. 651; *McNamara* v. *Cerf,* 4 F. (2d) 997; *Ulmer* v. *United States,* 266 Fed. 176.

In *Fraina* v. *United States, supra,* the court said (p. 30):

> There is no bill of exceptions. Both parties have agreed to call what is properly a transcript of the stenographer's minutes by that name; but giving it the requisite name does not make it the lawful thing. The consent is worthless, and it is of grace only that we consider the points argued. On this matter we spoke plainly in *Linn* v. *United States,* 251 F. 476.

In *McNamara* v. *Cerf, supra,* the court said (p. 998):

> What is called a bill of exceptions in this record requires some notice. It is 118 printed pages long, of which at least 30 are wholly superfluous, in that they consist of colloquies between counsel—doubtless once important, but of no use on appeal. The remainder is in question and answer, although the legal result in several instances was that plaintiff offered certain testimony, which the court rejected. It seems to be necessary to remind the bar that rulings such as we made in *Radford* v. *United States,* 129 F. 49, 63 C. C. A. 491, and *Linn* v. *United States,* 251 F. 476, 483, 163 C. C. A. 470, have never been overruled or abandoned. We have examined this bill of grace, and not of right. We would be justified in declining to consider the errors assigned.

Petitioner urges as a reason why the Circuit Court of Appeals should have exercised its discretion in this case that when, on October 27, a hearing was had on his motion for an extension and such other relief as might be proper (R. 23), certain members of the Circuit Court of Appeals informally suggested that they were without power to grant a further extension of time within which to settle and file the bill of exceptions, and suggested that he request the trial court to settle the typewritten minutes of the trial as the bill of exceptions and thereafter apply to the Circuit Court of Appeals for time to print a condensed record under Rule IX.

It should be pointed out that there is nothing in the record, other than that portion of the petition for rehearing (R. 23), from which may be made to appear what transpired before the Circuit Court of Appeals on the motion or what order was made, if any, by that court. No copy of the affidavit and petition for rehearing was served upon the Government, and Government counsel were therefore without an opportunity to controvert the statements contained in the affidavit. Even though the statement (R. 23) of petitioner in his affidavit be taken as an accurate recital of what transpired at the informal hearing on the motion, the most that can be said is that the suggestion of the Circuit Court of Appeals could hardly be taken as an order to the petitioner to follow a certain

course of action with reference to the perfection of his appeal. Perhaps the better interpretation to be placed upon the remarks of the Circuit Judges is that they were at most a suggestion as to a possible way out for a litigant who had been careless.

In an attempt to show that he was prejudiced by this suggestion of the Circuit Court of Appeals, petitioner attaches an affidavit to his petition for writ of certiorari (Pet. p. 37) in which petitioner's counsel states that "on October 27, 1936, when the Circuit Court of Appeals suggested the procedure finally adopted, it was stated to that court, in response to its question, that so far as the petitioner was concerned a narration and condensation for settlement could be completed within the time still remaining". (Pet. p. 39.) This constitutes a frank admission on the petitioner's part that the testimony could have been reduced to narrative form in the time remaining (five days, including Sunday). The significance of this assertion cannot be overestimated. The statement is in almost direct contradiction to that submitted by petitioner in an affidavit dated November 16 in opposition to the motion to docket and dismiss the appeal (R. 17), wherein it is said:

> Realizing that I was virtually out of court if further time was not obtained, I immediately sought relief in the Circuit Court of Appeals.

And again in his petition for rehearing (R. 22), he stated:

> Your petitioner thus [October 20] found it impossible to condense the record within the time allowed * * *

If the affidavit accompanying the petition (p. 39) reflects accurately what transpired in the Circuit Court of Appeals, why was it necessary to apply to that court for this extraordinary relief? If the Circuit Court of Appeals was informed that a condensation and narration might be effected within the five days between October 26 and November 1, why would it have suggested, as petitioner asserts, that petitioner settle his bill in question and answer form and thereafter apply for time to condense the record?

The transcript of testimony comprised about 4,000 pages (R. 19). Convicted on June 27, the petitioner had condensed but 600 pages by the latter part of September (R. 21). By the middle of October a total of 1,600 pages had been condensed. It does not appear that any further condensation ever took place. Thus, there remained to be condensed on October 26, 2,400 pages of testimony, exclusive of exhibits. If, therefore, as petitioner asserts, he could have condensed in five remaining days (including Sunday) the 2,400 pages of testimony, the finding of the Circuit Court of Appeals (R. 31) that "Appellant had four months and has offered insufficient excuses for his delin-

quency" is particularly convincing. The action of the Circuit Court of Appeals was fully justified and did not constitute in any sense an abuse of discretion.

The petitioner urges also (Pet. pp. 17–20; Br. pp. 24–25) that the action of the Circuit Court of Appeals in dismissing the appeal rather than in striking the bill of exceptions was erroneous since the Circuit Court of Appeals did not have before it an assignment of error and, therefore, was not in a position to determine whether there were errors on the record proper which would require the Circuit Court of Appeals to hear and determine the appeal even in the absence of a bill of exceptions.

Certainly if there had been any such assignments of errors it would appear to have been the duty of the petitioner to have called them to the attention of the Circuit Court of Appeals. So far as appears from the opinion of that court, as well as the various affidavits on behalf of the petitioner appearing in the transcript of record, there is nothing to indicate any assignment going to error on the record proper. Petitioner disavows any suggestion that there were in fact assignments of that character. (Br. p. 12, note.) In the absence of any showing that the petitioner was prejudiced by the action of the Circuit Court of Appeals in dismissing the appeal without the assignment of errors before it, it would not seem that this Court would be justified in reversing the judgment of the Circuit Court of Appeals on this ground.

CONCLUSION

For the reasons hereinbefore stated we respectfully submit that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 604.—October Term, 1936.

Reginald P. Ray, Petitioner,
vs.
The United States of America.
} On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 26, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Certiorari was granted to determine important questions which have arisen in the administration of the Criminal Appeals Rules promulgated May 7, 1934. 292 U. S. pp. 660 *et seq.*

Petitioner was convicted of violation of the mail fraud and conspiracy statutes. His timely appeal was taken on June 30, 1936. Within thirty days thereafter the trial judge extended the time to file a bill of exceptions to and including November 1, 1936, which was a Sunday. The trial had been long and the testimony was voluminous. On October 20, 1936, after unsuccessful efforts to obtain an agreement as to the condensation of the evidence, petitioner applied to the trial judge for an extension of time to settle and file the bill of exceptions. As it was found that the trial judge was without authority to grant that extension, petitioner sought an extension from the Circuit Court of Appeals, but his motion was denied on October 27th. He then asked the trial judge to settle the stenographer's minutes as the bill of exceptions. That motion was first denied on October 29th, but on the following day the trial judge expressed his willingness to receive a similar application if the colloquy of counsel was stricken from the transcript, that application to be made on Monday, November 2d. On that day the bill of exceptions, so prepared, was settled and filed. On November 16, 1936, the Government moved to docket and dismiss the appeal upon the ground that petitioner had failed to comply with Rules VIII and IX of the Criminal Appeals Rules. The motion was granted. Petitioner asked for a rehearing and was heard. Insisting that it was impossible within the allotted time to set forth the evidence

in condensed and narrative form, petitioner requested the Circuit Court of Appeals to exercise its discretionary power under Rule IX to the end that the defect in the bill of exceptions might be cured. That request was made simultaneously with the motion to dismiss. It appears to have been treated as a motion to amend the record and it was denied. The court took the view that as, by the assignment of errors filed with the bill of exceptions, the question was raised as to the sufficiency of the evidence to support the conviction, it was necessary under the rule that the evidence should be properly presented in condensed and narrative form. The court held that the time for the settlement of the bill of exceptions could not be enlarged, and that if the bill were returned to the trial judge he would be powerless to correct, amend or resettle it as the time for such action had expired.

Finally the court decided that petitioner was inexcusably delinquent. The court said: "This appellant had four months and has offered insufficient excuses for his delinquency. The bill of exceptions was insufficient". The motion to amend the record was denied and the motion to dismiss the appeal was granted. 86 F. (2d) 942.

First.—The Government contends that the bill of exceptions filed on November 2d was too late. The Circuit Court of Appeals correctly held the contrary. The trial judge, by valid order, had extended the time "to and including the 1st day of November, 1936", That day being Sunday, on which the bill of exceptions could not be filed, the trial judge construed his order as permitting the settlement and filing on the following day. Rule XIII of the Criminal Appeals Rules provides:

"For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded".

The Government argues that this rule refers to a "computation", as where the extension is for a certain term or period, and not to a case where a specific date is fixed. The latter case is said to lie outside the rule and we are referred to various decisions which are deemed to furnish analogies for our guidance in reaching a conclusion upon a point left open. But there appears to be no reason why Rule XIII should be so narrowly construed. The phrase "For

the purpose of computing time" was plainly intended to be of general application and "computing" naturally embraces whatever reckoning is necessary to fix the time allowed. When a specific date is fixed and that date falls on Sunday or a holiday, the rule for the reckoning requires that that day be excluded and hence the bill of exceptions, in this case, apart from other questions, was settled and filed in time.

Second.—The Circuit Court of Appeals had authority to extend the time for filing the bill of exceptions. Rule IX does limit the power of the trial judge to grant extensions. The purpose of the Rule being to expedite appeals in criminal cases, it was sought to put an end to the inordinate delays due to extensions of time to prepare bills of exceptions. Such extensions had been one of the most prolific causes of the delays in the disposition of criminal appeals. Accordingly Rule IX provides:

"In cases other than those described in Rule VIII [which refers to the record on appeal without bill of exceptions], the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII".

The Rule presupposes that the trial judge, who is familiar with the proceedings on the trial, is in a position to estimate the length of time that is necessary for the preparation and filing of the bill of exceptions, and he is permitted within thirty days after the taking of the appeal to fix that time. That is the limit of his authority,[1] save as he may act under the direction of the Circuit Court

[1]See White v. United States, C. C. A. 4th, 80 F. (2d) 515, 516; Yep v. United States, C. C. A. 10th, 81 F. (2d) 637; United States v. Adamowicz, C. C. A. 2d, 82 F. (2d) 288; Gallagher v. United States, C. C. A. 8th, 82 F. (2d) 721; Wolpa v. United States, C. C. A. 8th, 84 F. (2d) 829; Cusamano v. United States, C. C. A. 8th, 85 F. (2d) 132; Spero v. United States, C. C. A. 8th, 85 F. (2d) 134; Slade v. United States, C. C. A. 10th, 85 F. (2d) 786; Cary v. United States, C. C. A. 9th, 86 F. (2d) 461; St. Charles v. United States, C. C. A. 9th, 86 F. (2d) 463; Goddard v. United States, C. C. A. 10th, 86 F. (2d) 884; In re Lee, C. C. A. 5th, 87 F. (2d) 142; Wainer v. United States, C. C. A. 7th, 87 F. (2d) 77; Fitzpatrick v. United States, C. C. A. 7th, 87 F. (2d) 471; Miller v. United States, C. C. A. 9th, 88 F. (2d) 102; Hightower v. United States, C. C. A. 9th, 88 F. (2d) 302; Young v. United States, C. C. A. 10th, 88 F. (2d) 305. Compare Fierman v. United States, C. C. A. 3d, 84 F. (2d) 968.

of Appeals. But while this limit is placed upon the power of the trial judge, the Criminal Appeals Rules give full authority to the Circuit Court of Appeals to set aside or modify his order whenever it appears that there has been an abuse of discretion or that the interests of justice require it.

The fundamental policy of the Criminal Appeals Rules is that as speedily as possible, upon the taking of the appeal, the Circuit Court of Appeals shall be invested with jurisdiction to see that the appeal is properly expedited and to supervise and control all proceedings on the appeal "including the proceedings relating to the preparation of the record on appeal". For this purpose the Rules provide that the notice of the appeal shall be filed in duplicate with the clerk of the trial court and a copy of the notice shall be served upon the United States Attorney. Rule III. By Rule IV it becomes the duty of the clerk of the trial court immediately to forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form annexed to the Rules. This is a ministerial duty which the clerk of the trial court must perform. With respect to the authority of the Circuit Court of Appeals, Rule IV provides:

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail".

These provisions are comprehensive. The clause that the appellate court's supervision and control shall be "subject to these rules" refers to the rules governing the action of the appellate court. To make effective this supervision and control, any matter requiring correction may be brought before the appellate court upon the short notice of five days. Thus there may be not only a motion to dismiss the appeal but "for directions to the trial court" and "to vacate or modify *any order* made by the trial court or by any judge in relation to the prosecution of the appeal". As the supervision and control of the proceedings on the appeal expressly

embraces the proceedings "relating to the preparation of the record on appeal", it cannot be said that an order made by the trial judge fixing the time for the settlement and filing of a bill of exceptions is excluded. It is, of course, assumed that the Circuit Court of Appeals will not lightly interfere with the action of the trial judge. But the Rules appropriately provide for the correction of any miscarriage of justice in this respect, and the lodging of the supervision and control with the appellate court gives the highest assurance that on the one hand the action of the trial judge will not be interfered with unnecessarily and on the other that neither party will be remediless when corrective action is required. For example, it may clearly appear on a showing by the Government that the time allowed by the trial judge for the filing of a bill of exceptions is altogether too long and that, in the interests of a reasonably prompt disposition of the appeal, it should be shortened; or it may clearly appear that the time allowed is unreasonably short and that justice requires that an extension should be granted. To give a desirable flexibility, the Rules do not attempt to lay down specific requirements to meet various situations but place upon the Circuit Court of Appeals full responsibility for the exercise of a reasonable control over all proceedings pertaining to the appeal and all the orders of the trial court or judge in that relation.

Third. The Circuit Court of Appeals had authority to return the bill of exceptions to the trial judge and to require such correction as might be found to be appropriate, including the setting forth of the evidence in condensed and narrative form. Rule IX provides:

"Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

"Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

"The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate".

The authority of the Circuit Court of Appeals thus extends to the "correction, amplification, or reduction" of the record on appeal of which the bill of exceptions is a part. The appellate court is authorized to require a proper bill of exceptions and to give any directions to the trial court or trial judge that may be necessary to attain that end.

Rule 8 of the Rules of this Court to which Rule IX refers, provides (Rule 8, par. 2):

"Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570".

Under Equity Rule 75b we have held that the Circuit Court of Appeals is authorized, when a bill of exceptions is presented to it showing that the requirement for condensation or narration has been transgressed, to remit the transcript to the District Court so that a further opportunity may be had to comply with the Equity Rule. We also said that, in such a remission, care should be taken to require that the proceedings under the rule be conducted with reasonable dispatch. *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, 387. In that case this court concluded that the Circuit Court of Appeals had passed the bounds of sound discretion in affirming the decree appealed from, because of the violation of the Equity Rule, and upon proper terms, should have remitted the transcript to the District Court for appropriate revision. Nothing in the Criminal Appeals Rules, in incorporating the requirement of Rule 8 of the Rules of this Court, deprives the Circuit Court of Appeals of like authority in dealing with bills of exceptions in criminal cases. On the contrary, Rule IX gives to the Circuit Court of Appeals that authority. The ruling in the instant case that the trial judge could "no longer act to put the evidence in narrative form" and that the appellate court had "no power to order him to do so" is erroneous. The trial judge could act under the direction of the appellate court and that court could give whatever direction the case required in order to give effect to the Rule as to the proper preparation of the bill of exceptions.

Fourth.—The supervision and control of the Circuit Court of Appeals under the Criminal Appeals Rules calls for the exercise of a sound judicial discretion, and its action will not be reviewed unless it appears that its discretion has been abused. In the instant case, despite the mistaken view of its authority, the court appears to have rested its final conclusion upon the ground that, even if the court had the power to grant petitioner's request, the circumstances justified its denial. The court pointed to the fact that petitioner had four months to procure the settlement of the bill of exceptions and the court thought his excuses insufficient. While petitioner strongly insists upon the authority of the appellate court, he apparently took no steps to have that authority exercised in his favor until toward the end of October. He complains that at that time, upon his motion for an extension of time or other relief, the court itself suggested that an application should be made to the trial judge for an order settling the stenographer's minutes as the bill of exceptions, and that the circuit judges intimated to the Government's counsel that opposition to that course should be withdrawn. This, it is said, took place on October 27th. Petitioner urges that in directing the settlement of the bill of exceptions in its inappropriate form he was but following the suggestion of the appellate court in view of his exigency and with the idea that the condensation and narration of the evidence could later be obtained. But the Circuit Court of Appeals was fully acquainted with all that had taken place. When the later motions came before the court, it was clearly entitled to review the whole matter and reach a conclusion as to the proper exercise of its discretion. It was the province of the court to weigh the petitioner's excuses. It did so and found them to be without merit. In the light of its statement as to the ultimate ground of its action we cannot say that the court failed to exercise its discretion or that its action was an abuse of discretion. In that view the order is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.